(15)

No. 84-233-CSX
Status: GRANTED

Title: Phillips Petroleum Company, Petitioner
v.
Irl Shutts, et al.

Docketed:
August 9, 1984

Court: Supreme Court of Kansas

Counsel for petitioner: Kennedy, Joseph W.

Counsel for respondent: Chapin, W. Luke

Entry	Date	Note	Proceedings and Orders
1	Aug 9 1984	G	Petition for writ of certiorari filed.
2	Sep 7 1984		Brief amicus curiae of Amoco Production Co. filed.
3	Sep 7 1984		Brief of respondents Irl Shutts, et al. in opposition filed.
4	Sep 7 1984	G	Motion of Legal Foundation of America for leave to file a brief as amicus curiae filed.
5	Sep 10 1984	G	Motion of National Association of Independent Insurers for leave to file a brief as amicus curiae filed.
7	Sep 18 1984	X	Reply brief of petitioner Phillips Petroleum Co. filed.
9	Sep 12 1984		DISTRIBUTED. October 5, 1984
10	Oct 9 1984		Motion of Legal Foundation of America for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.
11	Oct 9 1984		Motion of National Association of Independent Insurers for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.
12	Oct 9 1984		Petition GRANTED. Justice O'Connor OUT.
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13	Nov 19 1984		Joint appendix filed.
14	Nov 21 1984		Brief amicus curiae of Amoco Production Co. filed.
15	Nov 21 1984		Brief amicus curiae of Legal Foundation of America filed.
16	Nov 23 1984		Brief of petitioner Phillips Petroleum Co. filed.
17	Dec 8 1984		Record filed.
18	Dec 8 1984		Certified original record received. (Box).
20	Dec 11 1984		Order extending time to file brief of respondent on the merits until January 7, 1985.
21	Jan 4 1985		SET FOR ARGUMENT. Monday, February 25, 1985. (4th case.)
22	Jan 7 1985		Brief of respondents Irl Shutts, et al. filed.
23	Jan 7 1985		Brief amicus curiae of Public Citizen Litigation Group filed.
24	Jan 7 1985		Brief amicus curiae of Consumer Coalition filed.
25	Jan 15 1985		CIRCULATED.
26	Feb 15 1985	X	Reply brief of petitioner Phillips Petroleum Co. filed.
27	Feb 25 1985		ARGUED.

No. 84-233

In the Supreme Court of the United States

October Term, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTIONS PRESENTED

In 1982 this Court granted review in *Gillette Co. v. Miner* to decide the propriety of a state's assertion of jurisdiction over a nationwide class. The issue was not reached because the case lacked finality. This case presents an identical jurisdiction issue, and, in addition, an interrelated choice of law issue, in the context of Kansas asserting jurisdiction over a nationwide class action brought by three royalty owners against Phillips Petroleum Company. In these circumstances, the questions presented are:

1. Whether a state court in a class action, consistent with basic principles of federalism and the due process clause of the Fourteenth Amendment, can exercise jurisdiction over unnamed class members and their claims when (1) the class members are nonresidents who have had no contacts with the forum state; (2) the class members have not affirmatively consented to its jurisdiction; and (3) the claims arose entirely in other states and the forum has no significant interest in them?

2. Whether a state court in a nationwide class action, consistent with the due process clause of the Fourteenth Amendment and the full faith and credit clause of Article IV of the Constitution, can apply its own law to transactions between nonresidents that occur in other states and to which the forum has no connection?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner Phillips Petroleum Company[1] prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Kansas entered in these proceedings on March 24, 1984.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (235 Kan. 195, 679 P.2d 1159) is set forth at page A2 of the Appendix. The unpublished order of the District Court of Seward County, Kansas, is set forth at page A48 of the Appendix.

1. Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix at page A68.

JURISDICTION

The opinion of the Supreme Court of Kansas was entered on March 24, 1984. A motion for rehearing was filed before the Supreme Court of Kansas on April 13, 1984 and was denied on May 11, 1984.[2] The Petition for A Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law * * *.

Article IV, § 1 of the United States Constitution provides in pertinent part:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

The statutory provision involved is Kan. Stat. Ann. § 60-223, which is set forth at page A65 of the Appendix.

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2. A copy of the order denying rehearing is set forth in the Appendix at page A1.

STATEMENT OF THE CASE

Petitioner, Phillips Petroleum Company (Phillips), a Delaware corporation with its principal place of business in Oklahoma, produced or purchased natural gas from oil and gas leases covering lands located in twelve (12) states. *See* A60 to A64. Phillips sold some of the produced gas to pipeline companies for transportation and resale in interstate commerce at prices regulated by the Federal Power Commission (F.P.C.).

Phillips was required to obtain F.P.C. approval of price increases for gas sales, but was permitted to collect the higher prices pending final approval subject to refund to the purchasing pipeline companies if any part of the price increases was not approved by the F.P.C. After final approval of a gas price increase, Phillips paid additional royalties computed with reference to the increased price pursuant to the various contractual relationships with the royalty owners. Payments of additional royalties were made between December 30, 1975 and July 1, 1980, after final resolution of court challenges to F.P.C. Opinions 699, 749, and 770.

In this Kansas state court action, three named royalty owners, for themselves and on behalf of all royalty owners, seek to recover interest on the additional royalties paid by Phillips. One of the named class representatives, Irl Shutts, is a resident of Kansas, the other two are residents of Oklahoma. The three named plaintiffs own oil or gas leases in Oklahoma and Texas, but not in Kansas.

Phillips moved to dismiss the claims of unnamed nonresident plaintiff class members on the ground that the state court could not constitutionally exercise jurisdiction over them. On May 1, 1982, the trial court denied the motion and certified a nationwide class of approximately

33,000 plaintiffs. Phillips then sought an original mandamus action in the Supreme Court of Kansas. On June 28, 1982, the Supreme Court of Kansas denied the petition without opinion. Phillips then petitioned this Court for certiorari, but review was denied. *Phillips Petroleum Co. v. Duckworth*, ... U.S. ....., 103 S.Ct. 725 (1983).

On January 27, 1983, this case was tried in the District Court of Seward County, Liberal, Kansas. Phillips was held liable to approximately 28,100 class members for interest computed pursuant to Kansas law.[3] The journal entry of judgment was filed on May 20, 1983. Phillips appealed, and on March 24, 1984, the Kansas Supreme Court issued its opinion affirming the trial court, but increasing the post-judgment rate of interest beyond that awarded by the lower court.

The judgment held Phillips liable to a class consisting of royalty owners residing in all 50 states, the District of Columbia, the Virgin Islands, and several foreign countries, despite the fact that fewer than 2.7% of the class members are residents of Kansas, less than 1/4 of 1% of the involved leases are located in Kansas, and Kansas leases account for only .003% of the additional royalties. A9.

Other states have far greater interests in this litigation. For example, both a majority of the leases and a majority of those people who received additional royalties are located in Texas. A62-A64. Oklahoma, which is the principal place of business of Phillips, has the next largest percentage of both royalty owners and leases.

Of the approximately $11.3 million in additional royalties paid, Texas residents received $4.7 million; Oklahoma

3. The 33,000 original class members were reduced by approximately 2,400 who elected to opt out, and by approximately 1,500 to whom notice could not be delivered.

residents $1.3 million; Kansas residents only $123,000. Oklahoma, Texas, Louisiana, New Mexico, and Wyoming, each have more of the involved leases located within their boundaries than does Kansas, and the additional royalties attributed to the leases in these states are substantially greater than the royalties related to Kansas leases. The tables at A62-A64 show other states with a far greater interest in this litigation than Kansas. By any measure, the Kansas connection is truly de minimis.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents A Constitutional Question Involving The Limits Of State Court Jurisdiction That Can Be Resolved Only By This Court, That Has Been The Subject Of Conflicting Decisions In State Courts, And That Has Substantial Practical Consequences for State Court Class Action Litigants

In this case, the Kansas court extended its jurisdiction over unnamed plaintiff class members further than any other state court has yet attempted. The court held that the only Constitutional pre-conditions for exercising jurisdiction over an unnamed plaintiff class member are notice and adequate representation. The court held that nonresident plaintiffs could be bound by its judgment notwithstanding the complete lack of any nexus between the nonresidents, their claims, and the forum.[4] Although less

4. The petitioner has standing to raise the question of jurisdiction over these nonresident class members. This Court has held that when, as here, acquisition of jurisdiction over a nonresident is required before a state court is empowered to proceed with the action, then "any defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Hanson v. Denckla*, 357 U.S. 235, 245 (1958).

than 2.7% of the class resided in the state, Kansas purported to assert jurisdiction over and bind the entire nonresident class.

This constitutional issue is of great national importance because (1) it has never been decided by this Court, (2) the Kansas court's conclusion is contrary to the holdings of this Court on the limits of state court jurisdiction under the Fourteenth Amendment, (3) the holding below conflicts with decisions of other states that have addressed this issue, and (4) until this Court definitively resolves this question, the confused situation disrupts the orderly administration of the law in the various states and basic principles of federalism in a context that is certain to arise frequently.

In 1982, this Court recognized the importance of this constitutional question when it granted certiorari in *Gillette Co. v. Miner*, 456 U.S. 914 (1982). After that case was briefed and argued, the writ was dismissed for lack of a final judgment. 459 U.S. 86 (1982). This case raises an issue of state court jurisdiction that is identical to the one in *Gillette*, but the decision below is full and final. Nothing now prevents reaching this important question.

The issue is of major significance because the exercise of jurisdiction over unnamed, nonresident plaintiffs involves fundamental questions of federalism that were resolved against Phillips contrary to the holdings of this Court. In *Rush v. Savchuk*, 444 U.S. 320, 327 (1980), the Court reiterated that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* [*Co. v. Washington*, 326 U.S. 310 (1945)] and its progeny * * *," *quoting Shaffer v. Heitner*, 433 U.S. 186, 212 (1977). This Court has made it clear that this requirement is "a consequence of territorial limitations on the powers of the respective states,"

which is "imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 294 (1980). Adjudicating and extinguishing claims of unnamed plaintiff class members who have no contacts with the state, and who do not affirmatively consent to jurisdiction is contrary to the requirement that "minimum contacts" with the forum must exist.[5] Certiorari should be granted to make it clear that this Court's holdings on the limits of state judicial power represent the law of the land and that the Kansas court is incorrect in concluding that jurisdiction over nonresident class plaintiffs can be based entirely on notice and representation.

A significant constitutional violation occurs when a state court arrogates to itself the power to compel a nonresident to take affirmative action to avoid its jurisdiction. This Court repeatedly has said, the "unilateral activity of those who claim some relationship with a nonresident" are not constitutionally sufficient to satisfy the requirements of due process. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 298. *See also, Helicopteros Nacionales de Columbia, S.A. v. Hall*, ... U.S. ....., 104 S.Ct. 1868, 1873 (1984). A state that does not have power to compel a nonresident to submit to its jurisdiction cannot logically have power to compel that nonresident to take affirmative action to avoid

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5. In *Keeton v. Hustler Magazine, Inc.*, ... U.S. ....., 104 S.Ct. 1473 (1984), the Court held that a plaintiff may choose to bring suit in a forum with which she previously had no contact, but in which she suffered damage. The Court did say that "we have not to date required a plaintiff have 'minimum contacts' with the forum state before permitting that state to assert personal jurisdiction over a nonresident defendant," 104 S.Ct. at 1480-81, but this must be read in the context of a plaintiff's voluntary choice of the forum. *Keeton* should be contrasted with the present case in which (1) class members did not choose the forum, and (2) class members did not suffer damage in the forum.

its jurisdiction. A contrary rule, which is tantamount to jurisdiction over nonresidents by default, would invite extensive invasions of state sovereignty flatly inconsistent with the limitations on state power imposed by our federal system as spelled out in *World-Wide Volkswagen*.

The Kansas court, by reaffirming its opinion in *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, *cert. denied*, 434 U.S. 1068 (1978) (*Shutts I*)[6] suggested that *Hansberry v. Lee*, 311 U.S. 32 (1940), made class actions an exception to the minimum contacts requirement. That case did not present any issue of state court jurisdiction.[7] This Court simply observed in passing that courts sometimes are called upon to proceed with causes in which joinder of all those interested is difficult or impossible because, *inter alia*, "some are not within the jurisdiction." 311 U.S. at 41. This dictum, which does not relate to due process requirements at all, is what the Kansas Supreme Court relied upon to justify its position. The *Hansberry* statements merely identify the procedural steps necessary to adjudicate claims of a class over which a state court has jurisdiction. The cases cited in *Hansberry*, all of which evidence an independent basis of juris-

6. *Shutts I* was an earlier lawsuit between Phillips and one of the present plaintiffs involving additional royalties paid following an earlier F.P.C. rate opinion applicable only to the Hugoton-Anadarko rate area. The plaintiff was allowed to act as class representative for all royalty owners who received additional royalties. The Kansas court held that Kansas had a legitimate interest in the litigation because that state comprised the largest physical portion of the Hugoton-Anadarko rate-making area. 222 Kan. at 557, 567 P.2d at 1314-15. Whatever the merits of the Kansas court's decision in *Shutts I*, since the F.P.C. orders involved in this case are nationwide orders, not even this affiliating circumstance is present.

7. *Hansberry* involved a class action based on property interests in the forum state, and thus, unlike the situation here, there was both ample contacts between class members and the forum state and a substantial justification for permitting the forum state to exercise jurisdiction.

diction, clearly indicate that this Court had no intention of abandoning that requirement in class actions. The Kansas Supreme Court is entirely wrong in claiming *Hansberry* wholly exempts class actions from the minimum contacts requirement.[8]

The holding below that the "minimum contacts" test is inapplicable to class plaintiffs is directly contrary to the numerous statements by this Court that *all* assertions of state-court jurisdiction must be evaluated by the standards of *International Shoe*. Denial of a plaintiff's claim in a class action is no less substantial an exercise of state power than is the imposition of liability on a defendant; both should be governed by the same constitutional restrictions.

There is *no* decision of this Court that allows state court jurisdiction over nonresident class members under the circumstances of this case. The nonresidents have not engaged in any conduct relating to Kansas and their claims can be heard in other forums that have a much more significant interest. None of the factors this Court has demanded in the past to support state court jurisdiction is present.

By ignoring the nexus requirement, the decision below, along with the Illinois decision in *Miner v. Gillette Co.*, 87 Ill.2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 456 U.S 914, *cert. dismissed*, 459 U.S. 86 (1982) represent the

8. *Hansberry* was decided in 1940, five years before *International Shoe*. Even if the *Hansberry* dictum had a jurisdiction-broadening implication, it must be read as pertaining to a jurisdiction era controlled by strict notions of "presence" and "consent" and a time when class actions were limited to situations in which the members of the class had a defined community of interest in property or contract. *Hansberry* cannot be read as authority for creating a departure from the more flexible and sensitive "minimum contacts" test of *International Shoe* that was developed after the oblique dicta in *Hansberry* or to class actions in which the members share nothing more than common questions of law or fact.

radical end of the spectrum of state court holdings on the jurisdictional issue. They directly conflict with the decisions of the Pennsylvania Supreme Court in *Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976) (plaintiff class limited to residents and those nonresidents who submit themselves to the court's jurisdiction), and the New Jersey Appeals Court in *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976) (a state court cannot exercise jurisdiction over nonresident class members who have no "contacts, ties or relations" with the state). *Klemow* and *Feldman* properly require nexus.

Other cases treating this issue include *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977); *Schlosser v. Allis-Chalmers Corp.*, 86 Wis.2d 226, 271 N.W.2d 879 (1978), and *Geller v. Tabas*, 462 A.2d 1078 (Del. 1983). These decisions might be seen as allowing the assertion of jurisdiction over unnamed plaintiffs when the underlying action has a nexus to the forum state. *See also, Katz v. NVF Company*, 462 N.Y.S.2d 975 (N.Y.Sup.Ct. 1983); *Brandon v. Chefetz*, 467 N.Y.S.2d 312 (N.Y.Sup.Ct. 1983) (assessment of relationship between litigation and forum necessary in order to certify nationwide class); and *Anthony v. General Motors Corp.*, 33 Cal.App.3d 699, 109 Cal. Rptr. 254, 260 (1973) (issue of jurisdiction over nonresident class members discussed but not decided).

As a result of these inconsistent state court decisions, Kansas or Illinois can enter class action judgments that would be unenforceable in Pennsylvania, New Jersey, or any other state that concludes that class actions are governed by the jurisdiction rules established by this Court. Thus, the unsettled state of the law renders unclear whether the judgment entered in this Kansas action will be accepted as binding by the Texas or Oklahoma courts or

any other state having a more significant relationship with this dispute than does Kansas.[9]

In light of the conflicting approaches taken by different state courts, the holding below threatens the orderly administration of the law in the various states. It makes real the specter of forum shopping by plaintiffs who wish to employ the class action.[10] If minimum contacts, nexus, and affiliating circumstances are not the proper touchstones, then the possibility that any state may entertain a nationwide class action deprives both defendants and potential class members of any "degree of predictability" that would allow them to "structure their primary conduct with some assurance as to where that conduct will or will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297.

Permitting nationwide class actions unconstrained by minimum contacts poses a serious threat to the enforcement of diverse policies by various states, particularly in areas of the law such as contracts related to real property interests, such as this case. The forum court will tend to effectuate those policies deemed most important by that court even though they may be at odds with the policies of

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9. Oklahoma requires class plaintiffs to opt-in. Okla. Stat. Ann. tit. 12, § 14. In view of Oklahoma's legislative position, that state may not recognize a judgment rendered in a Kansas class action as binding unnamed class members who did not opt-in —particularly a citizen of Oklahoma. That conclusion is even more likely in the case of a class action judgment adverse to the class members.

10. Betty and Robert Anderson, residents of Oklahoma, originally instituted a virtually identical class action suit in an Oklahoma state court but dismissed that suit to join with Irl Shutts as plaintiffs in the Kansas action.

other states.[11] The result below promotes the possibility that certain states will use the class action to arrogate to themselves the power to establish and enforce a nationwide policy contrary to one that would be chosen by a state more interested in the underlying transactions. That is what Kansas has done.[12]

Unless the class action jurisdiction of state courts is limited by requirements of minimum contacts and affirmative consent, the likelihood of conflicting nationwide state court class actions involving the same claims is assured. Only by enunciating national governing principles of state court jurisdiction in this context can this Court prevent a state that has no discernible interest in the adjudication of nonresident claims, as is true here, from invading the sovereignty of other states.

2. The Decision Below Violates Phillips' Rights Under The Due Process Clause And The Full Faith And Credit Provision By Applying Only Kansas Law To All Claims In The Class Action

The Kansas Supreme Court held:

11. The tension created by this device is exacerbated when a state has enforced policies that deviate markedly from other states. Kansas, for example, has adopted pro-lessor approaches to disputes between oil and gas lessors and producers by extending to the lessors rights that have not been recognized in other states. *See, e. g., Matzen v. Cities Service Oil Co.*, 233 Kan. 846, 855, 667 P.2d 337, 344 (1983), *consideration of petition for cert. deferred*, ... U.S. ..... (6/25/84). States with other strong policies concerning consumer protection, product liability, or tort liability for example, may utilize the nationwide class action device to impose what they believe to be the "best" policy on other states.

12. Although even more than the twelve states that were the situs of gas producing properties in the present case are states that have had gas production subject to the F.P.C. Opinions, no state other than Kansas has a reported decision involving a class action seeking interest on additional royalties. Kansas has reported decisions in at least eight such class actions, including the present action (A27) and has entertained others.

> Where a state court determines it has jurisdiction over a nationwide class action and procedural due process guarantees of notice and adequate representation are present, we believe the law of the forum should be applied unless compelling reasons exist for applying a different law.

A43. Thus, Kansas law was applied to this entire controversy (1) despite prior Kansas cases holding that the law of the states in which the underlying contracts were made or the law of the states where those contracts were performed governed, *see, e. g., Shutts I*, 222 Kan. at 563, 567 P.2d at 1318, and (2) even though the outcome would be different under the laws of at least some of the eleven other states interested in this dispute, as is made clear by the outcome determinative Texas precedents relating to Texas leases and lower Texas interest rates, about which the court below was fully informed.[13] Although the rights of nonresident class members necessarily arose outside the forum state,[14] the court below held: "Compelling reasons do not exist to require this court to look to other state laws to determine the rights of the parties involved in this lawsuit." A43.

13. For a few of the conflicts, compare *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977) (Phillips' offer to pay under indemnity ineffective to terminate liability for interest), with *Phillips Petroleum Co. v. Riverview Gas Compression Co.*, 409 F. Supp. 486 (N.D. Tex. 1976) (offer to pay under indemnity terminates liability for interest as of the date of the offer). In addition, compare *Shutts v. Phillips Petroleum Co., supra* (interest liability measured by federal rate), with *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978) (statutory rate of interest applies).

14. It is conceivable that a small number of nonresidents may have an interest in one or more of the 15 Kansas leases. The record is silent, however, on this point. At best, these interests are de minimis.

The court below granted plaintiffs in a class action the right to choose not only the forum in which to have their claims heard, but also tne right to choose the governing law. In this case that was done despite the fact that more than 97% of the class members have no contacts with Kansas and more than 99% do not have any interest in a Kansas oil or gas lease. According to the Kansas court all of this was cured because by having failed to opt out: "The plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." A43. The consequences of this bootstrapping logic are obvious: "If a plaintiff could choose the substantive rules to be applied to an action * * * the invitation to forum shopping would be irresistible." *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 337 (1981) (Powell, J., dissenting).

The Kansas court completely disregarded the recent holding of this Court that "for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its laws is neither arbitrarily nor fundamentally unfair." *Allstate Ins. Co. v. Hague,* 449 U.S. 312-13. In *Hague* the forum's law was applied to permit "stacking" of insurance policies to allow recovery by a forum resident for the death of her husband who had worked in the forum for an extended period of time.

There are no comparable affiliating circumstances in the present case. Although the Kansas court claimed to have a "significant legitimate interest in adjudicating the claims of the class members" (A43), the only "interest" identified by the court was the fact that Phillips "conducts business and holds assets in Kansas." A26. Yet it is difficult to conceive of any more compelling showing that could be made for the application of another state's laws than to establish, as Phillips did, that (1) the claims bore

no relationship whatsoever to the forum state, (2) the nonresident class members had no affiliation whatsoever with Kansas, and (3) the application of the interested other state's laws leads to a different result. That being so, the Court must invalidate the Kansas court's choice of forum law as it did in *Home Ins. Co. v. Dick,* 281 U.S. 397 (1930), and *John Hancock Mutual Life Ins. Co. v. Yates,* 299 U.S. 178 (1936). To allow a state court to determine contractual and property rights that arise in eleven other states on the sole basis that a foreign corporation can be found in the forum makes an absolute mockery of choice of law rules.

The combined effect of the Kansas court's assertion of jurisdiction over nonresident members of the class having no contacts with Kansas and the application of Kansas law to the entire action is pernicious. It means that a citizen of Texas who has leased oil and gas rights in Texas land to Phillips, which is incorporated in Delaware and has its principal place of business in Oklahoma, will have his rights under the lease determined by Kansas law. This will occur simply because a Kansan he has never met, has joined together with two Oklahomans neither has met, to bring a class action in Kansas that purports to embrace our Texan. What conceivable legitimate public policy of Kansas justifies this result? And, is it not obvious that the application of Kansas law comes as a complete surprise to both the Texas royalty owner and Phillips?[15] *Cf. Allstate Ins. Co. v. Hague,* 449 U.S. at 317-18.

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15. The illustration, of course, describes virtually every member of the class in this action. The result below is even more unacceptable as applied to a non-Kansas royalty owner who has a non-Kansas lease with an oil company other than Phillips that has sold the gas to Phillips under an agreement that obliges Phillips to assume the obligation to pay the royalty owner. Many of the class members in this case are in exactly that situation, for as noted in the statement of facts, Phillips is both a producer and *a purchaser of gas.*

To the extent that Kansas law is more favorable to royalty owners than Texas law, the Texas class member is not prejudiced and has no incentive to contest the Kansas class action or the application of Kansas law. But that should not mask the fact that Kansas is attempting to rewrite the contractual relationship between the Texas royalty owner and Phillips with regard to oil and gas rights relating to Texas land, a matter intimately tied up with the public policy of the sovereign state of Texas. Moreover, consider the implications when the law of the state in which the class action is commenced is less favorable to the rights of royalty owners and purports to redefine the contractual relationship between a national class of royalty owners and an oil company in a way that is favorable to the oil company. In that situation, the application of forum law may directly impair the rights of citizens in numerous other states, once again violating the public policy of those states. This is precisely the type of interstate legal imperialism our choice of law rules are designed to prevent.

The Kansas court's holdings on jurisdiction and conflict of laws create an intolerable situation in which Kansas can adjudicate a nationwide class action and apply Kansas law without any contacts among the dispute, the parties, and the state. Under Kansas' unique approach to choice of law, the mere institution of a class action in Kansas provides the foundation for applying Kansas law. It is impossible to imagine what type of a showing of rights guaranteed a defendant or nonresident class members by other states would convince Kansas to apply another state's substantive law. In the class action context, contract rights, settled interests, and definite expectations intimately related to another state are shattered on a tremendous scale. These cases simply cannot be exempted from the normal choice of law rules without creating a

"substantial threat to our constitutional system of cooperative federalism." *Nevada v. Hall*, 440 U.S. 410, 424 n. 24 (1979).

If the integrity of the contractual relationships between Phillips and property owners in eleven states other than Kansas are to be protected by the due process and full faith and credit clauses, certiorari must be granted and the holding of the Kansas court must be reversed. This is particularly important because the implications of what Kansas has done go far beyond this action. Since what is good for the goose is good for the gander, other states may choose to follow the lead of Kansas with regard to nationwide class actions. Moreover, this problem is not limited to oil and gas lease matters, as the assertion of jurisdiction by Illinois over a nationwide consumer class action in *Miner v. Gillette Co.* illustrates.

Only this Court can assure Phillips, other defendants, and nonresident class members that the rights guaranteed by the laws of the state in which a contract is entered into, or property is located, or a tort occurs, will be respected in Kansas. The Kansas court's holding must be overturned in order to prevent state courts from imposing forum law on thousands of transactions and citizens when that state has no legitimate interest through the expedient of declaring a nationwide class action premised on nothing more than a common question of law or fact.

3. The Court Should Grant Review To Address The Common Fund Issue In This Case

Further confusing the issue, the Kansas court, rationalized its result by concluding that the case was "closely analogous" to "common fund" class action cases. A13.

These cases include *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915), and *Supreme Council Royal Arcanum v. Green*, 237 U.S. 531 (1915). This conclusion provided both a basis for the court's holding that due process requirements were met, notwithstanding the absence of any nexus between the class action and the forum (A13), and it purported to provide a contact between the nonresidents and the litigation that justified assertion of jurisdiction in Kansas. A28. Moreover, the "common fund" characterization was invoked by the court to rationalize the application of Kansas law. Indeed, the finding of a "fund" may have been seen by the Kansas court as providing it a *res* of which it could determine ownership.

The Kansas court's transmutation of this Court's true "common fund" cases to the present situation is sheer alchemy. In reality there is no "fund" in Kansas. This case involves nothing but a series of individual contract claims by property owners in 12 different states relating to mineral royalties in those states.[16] These claims are not in Kansas, and are not dependent upon Phillips ever having any funds in Kansas to satisfy them. Even if a "fund" could be fabricated or fictionalized, the laws of the various states that govern the contract claims prevent the "fund" from being "common," and even if one state's laws governed, the rights of the class members are not "common" because each must still depend upon individual contractual relationships.

The court below also ignored the changes in jurisdictional thinking since the "common fund" cases were decided. In *Shaffer v. Heitner*, 433 U.S. 186 (1977),

16. This Court has made clear in the analogous context of interpleader that contract claims are personal and require satisfaction of the usual rules of state court jurisdiction. *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916).

the Court held that the "quasi-in rem" characterization of a case does not immunize it from the minimum contacts requirement: "[A]ll assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 433 U.S. at 212. Conjuring up a *res* from a series of disconnected contract claims and basing judicial power on Phillips' presence in the state certainly is not sufficient to justify asserting jurisdiction to determine these contract claims. *See Shaffer v. Heitner*, 433 U.S. at 212. Characterizing the "common fund" cases as an exception to the minimum contacts requirement, and aggregating these claims into a "common fund" bypasses all of the due process safeguards enunciated by this Court since *International Shoe*.

Moreover, the Kansas court has failed to recognize that the decisive factor in the "common fund" cases was the significant affiliating circumstances between the defendant, the forum, and the litigation. In the very cases cited by the Kansas court, the binding judgment was decided in the defendant's state of incorporation, the causes of action arose and were determined by the laws of the forum state, and that state had the most significant interest in the dispute. Indeed, this Court in *Hartford Life Ins. Co. v. Ibs* explicitly held that a "common fund" class action "should be brought in a court of the state where the company was chartered and where the * * * fund was kept." 237 U.S. at 672. The Kansas Supreme Court's approach requires only that a single party having a claim, which it alleges is in common with others, be a resident of the forum state.

Logically extended, the Kansas court's all-embracing approach allows any aggregation of claims of class members to be transformed into a common fund. This overarching "common fund" rationale then acts as an all-purpose jus-

tification for asserting state court jurisdiction and applying forum law. This fiction, unless repudiated, will remove class actions from the normal operation of constitutional guarantees. Accordingly, this Court should grant certiorari to make it clear that the "common fund" notion formulated by the Kansas Supreme Court does not pass constitutional muster.

CONCLUSION

For the reasons stated, the Petition for A Writ of Certiorari should be granted. The time has come to settle these vitally important questions of jurisdiction and choice of law.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 83-55796-AS

Irl Shutts and Robert Anderson and Betty Anderson, Individually and as representatives of certain others,
Appellee,

v.

Phillips Petroleum Company,
Appellant.

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date May 11, 1984

No. 55,796

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 669, 669H, 749, 749C, 770 and 770A, *Appellees, v.* PHILLIPS PETROLEUM COMPANY, *Appellant.*

SYLLABUS BY THE COURT

1. CLASS ACTION—*Jurisdiction over Nonresident Plaintiff Class Members.* While the essential element to establish in personam jurisdiction over nonresident defendants is some "minimum contacts" between the defendant and the forum state, the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process.

2. SAME—*Jurisdiction over Nonresident Plaintiff Class Members—Due Process—Binding Judgment.* Where the procedural due process guarantees of notice and adequate representation are present, Kansas courts may exercise jurisdiction over nonresident plaintiffs in a class action under K.S.A. 60-223 and issue a judgment binding on the nonresident plaintiff class members.

3. SAME—*Representation of Class—Due Process.* The class action is premised on the theory that members of the class who are not before the court can justly be bound because the self-interest of their representative coincides with the interest of the members of the class and will assure adequate litigation of the common issues. Where the interests of absent class members have not been adequately represented, binding

them by the class judgment would seem to offend the requirements of due process. Notice to absent members of the class in this regard is particularly important, for it is the greatest single safeguard against inadequate representation.

4. SAME—*Representation of Class—Adequacy.* What constitutes adequate representation is a question of fact to be determined by the trial court based upon the circumstances of each case. The decision should not be disturbed on appeal absent a showing of an abuse of discretion.

5. SAME—*Representative of Class—Adequacy—Considerations.* In determining the adequacy of the representative the trial court should consider: (1) whether there is adequate competent counsel; (2) whether the litigants are involved in a collusive suit; (3) whether the interests of the named parties are conflicting with or are antagonistic in any way to the interests of the other members of the class; (4) whether the named representatives' interests are coextensive with the interests of the other members of the class; and (5) the extent of the named representatives' interests in the suit's outcome.

6. SAME—*Certification of Class Action—Trial Judge Considerations.* Before a class action is certified the trial judge should consider concepts of manageability in terms of our Kansas class action statute, the nature of the controversy and the relief sought, the interest of Kansas in having the matter determined, and the class size and complexity.

7. SAME—*Prerequisites to Class Action—Commonality Requirement.* The commonality requirement of K.S.A. 60-223(*a*)(2) requires the existence of either a com-

mon question of fact or a common question of law. It does not require the presence of both.

8. SAME—*Jurisdiction over Nonresident Plaintiff Class Members—Due Process Notice Requirements.* In a review of the record on appeal involving a plaintiff class action which includes nonresident plaintiffs, it is *held*: Reasonable notice and adequate representation were afforded the absent nonresident plaintiff class members which satisfies jurisdictional and constitutional due process requirements.

9. EQUITY—*Party Making Use of Another's Money Should Pay Interest on Money So Used.* Where a party retains and makes actual use of money belonging to another, equitable principles require that it pay interest on the money so retained and used.

10. OIL AND GAS—*Interest on Royalties Held in Suspense.* In an action by royalty owners against their producer or purchaser of gas for interest on royalties held in "suspense," pending determination of lawful rates by the Federal Power Commission, it is held that interest on suspended royalties may be recovered for the period of time such royalties remained in the control of, and were available for use by, the gas producer or purchaser during the pendency of FPC proceedings and related litigation regarding the determination of applicable lawful rates for gas sales, and litigation regarding the determination of issues involved in this appeal.

11. SAME—*Contract between Gas Producer and Royalty Owners for Month-to-Month Payments—Obligation of Producer to Pay Interest on Suspended Royalties.* Where the lessee gas producer has expressly contracted to make month-to-month payments to the royalty owners based upon the price received for the sale of

any gas in the designated area, the obligation to pay interest on the suspended royalties owed the royalty owners exists whether during the period in which the royalties where suspended the gas was purchased by a pipeline company and the increased price was actually received, or the gas was consumed by the producer.

12. SAME—*Interest on Royalties Held in Suspense—Royalty Owners Not Parties to Contracts between Buyers and Producers Are Entitled to Interest on Suspense Royalties.* Where casinghead gas contracts entered into between producers (lessees) and the buyer of gas provide that the buyer pay royalties on behalf of the producers and further provide that suspense royalties held pending FPC determination of lawful rates be paid to royalty owners, after the rate increase is authorized, "without interest," the royalty owners who are not parties to the contracts are entitled to interest on the suspense royalties which they otherwise are entitled to under the leasing agreement.

13. CLASS ACTION—*Jurisdiction of State in Multistate Class Action—Application of Law of Forum State.* Where a state court determines it has jurisdiction over a multistate class action and procedural due process guarantees of notice and adequate representation are present, the law of the forum should be applied unless compelling reasons exist for applying a different law.

14. SAME—*Attorney Fees—Considerations.* In determining the amount of attorney fees to be awarded in a class action the trial court must hold an evidentiary hearing so that it has before it sufficient information to make a fair and adequate fee award. Factors which should be considered by the trial court in determining

the size of attorney fees in a class action include: (1) the number of hours spent on the case by the various attorneys and the manner in which they were spent; (2) the reasonable hourly rate for each attorney; (3) the contingent nature of success; (4) the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing the amount to which the court has found the attorney reasonably entitled; (5) the amount involved in the class action; and (6) the benefit produced by the lawsuit.

15. SAME—*Attorney Fees—Appellate Review.* Where established guidelines are followed by the district court in determining the size of the attorney fee to be awarded in a class action, appellate review is limited to abuse of discretion.

Appeal from Seward district court; KEATON G. DUCKWORTH, judge. Opinion filed March 24, 1984. Affirmed as modified.

Joseph W. Kennedy, of Morris, Laing, Evans, Brock & Kennedy, Chartered of Wichita, argued the cause, and *Robert W. Coykendall,* of the same firm, *James R. Yoxall,* of Light, Yoxall, Antrim & Richardson, of Liberal, and *T. L. Cubbage, II,* of Phillips Petroleum Company, of Bartlesville, Oklahoma, were with him on the briefs for the appellant.

W. Luke Chapin, of Chapin, Penny & Goering, of Medicine Lodge, argued the cause, and *Ed Moore,* of Ginder & Moore, of Cherokee, Oklahoma, and *Harold K. Greenleaf,* of Smith, Greenleaf & Brooks, of Liberal, were with him on the brief for the appellees.

Gerald Sawatzky and *Jim H. Goering,* of Foulston, Siefkin, Powers & Eberhardt, of Wichita, were on the brief for the *amicus curiae,* Sun Oil Company.

The opinion of the court was delivered by

SCHROEDER, C.J.: This is a class action suit brought against Phillips Petroleum Company (Phillips) by Irl Shutts, Robert Anderson and Betty Anderson, individually and on behalf of 28,100 royalty owners, including those who are not residents of Kansas, for recovery of interest on "suspense royalties" on gas produced from leases in eleven states. These royalties were withheld by Phillips at various times from July 1974 to February 1978 under three Federal Power Commission (FPC) opinions pertaining to gas rates in nationwide gas rate proceedings, and later paid by Phillips to the royalty owners without interest. The trial court determined (1) the class consisted of all royalty owners and overriding royalty owners who received suspense royalties from Phillips, whether or not they were residents of Kansas, (2) Phillips was liable for interest on all royalties and overriding royalties retained by it under the FPC opinions, and (3) the applicable rate of interest owed on the suspended royalty payments. Phillips challenges these findings on appeal. The plaintiff class has cross-appealed contending the trial court incorrectly determined the applicable rate of interest.

With a few exceptions this case is similar in legal issues and factual situation to that presented in *Shutts, Executor v. Phillips Petroleum Co.,* 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied* 434 U.S. 1068 (1978) (hereinafter referred to as *"Shutts I"*). The following relevant facts were stipulated to by the parties in the pretrial order and later adopted by the trial court as part of its findings of fact in its journal entry of judgment. This action was filed in July 1979, by Irl Shutts, a resident of Kansas, and Robert Anderson and Betty Anderson, residents of Oklahoma. Shutts is the owner of royalty interests under five leases owned by Phillips in Texas and Oklahoma. The Andersons are owners of gas royalty interests under a lease owned by Phillips in Oklahoma.

Notice was given to 33,000 potential class members by first-class mail. Approximately 3,400 class members elected to opt out of the class and notice could not be delivered to approximately 1,500 other potential class members, thereby reducing the size of the class to approximately 28,100 members. No notice by publication was used in this case.

Beginning with FPC Opinion No. 699 the Federal Power Commission began rate making on a nationwide, rather than areawide, basis as had been done previously. Payments of gas royalties were suspended in part by Phillips under FPC Opinion No. 699 from July 1974 through July 1976; under FPC Opinion No. 749 from January 1976 through February 1978; and under FPC Opinion No. 770 from August 1976 through July 1977. Notices of the suspended payments were sent to royalty owners on various dates during the suspension periods. Following final approval of price increases, royalties were paid to the royalty owners in the approximate amounts of $3,700,000 under Opinion No. 699; $2,900,000 under Opinion No. 749; and $4,700,000 under Opinion No. 770.

Increased prices for gas sales were collected by Phillips during the suspension periods subject to a duty to refund to the purchasers in the event the ordered price increases were not approved. Through all or part of the periods of suspension Phillips withheld the royalty payments attributable to the price increases in Opinion Nos. 699, 749 and 770, unless the royalty owners put up an acceptable indemnity to repay the increased portion of the royalty *with interest* if the price increases were not approved.

On termination of the suspension periods Phillips resumed payments of royalties based on the increased prices to all of its royalty and overriding royalty owners to whom

it accounted. Phillips also paid the royalty and overriding royalty owners the increased royalties due them which had been suspended under the three FPC opinions. *Phillips neither paid nor offered to pay interest on the royalties which had been suspended under the FPC orders.*

The following chart indicates the number of leases located in Kansas and number of Kansas royalty owners, in relation to the total number of leases and royalty owners, affected by the three FPC opinions:

OPINION NUMBER:	699	749	770
Number Leases Affected	7,389	6,109	6,232
Number Leases in Kansas	3	15	4
Royalties Paid on Kansas Leases	$ 152.88	$ 2,619.24	$ 115.10
Total Royalties Paid	$3,696,274.97	$2,873,827.18	$4,744,024.10
Total Number Royalty Owners Affected	22,328	20,566	19,298
Number of Kansas Royalty Owners	496	533	504
Royalties Paid to Kansas Royalty Owners	$ 9,281.75	$ 37,818.00	$ 75,538.68

The largest number of leases affected under all three opinions are located in Texas and Oklahoma. Royalty owners who were paid suspense royalties under the FPC opinions are domiciled in the 50 states, the District of Columbia, the Virgin Islands, and several foreign countries. Further facts will be developed as necessary to discuss the issues raised on appeal.

Phillips first contends the trial court erred in certifying a nationwide class because (1) the court's exercise of jurisdiction over nonresident plaintiffs is not in accord with recent decisions of the United States Supreme Court and is prohibited by the due process clause, and (2) sufficient affiliating circumstances do not exist between the plaintiff class and forum to satisfy the requirement set forth in *Shutts I* that the forum have a legitimate interest in adjudicating the common claims of the plaintiff class. Following a hearing on the motion to certify the class the trial court determined, in pertinent part:

> "2. The claims of plaintiffs are typical of the claims of all the members of the class except that each owner may be entitled to a different amount of interest and the interest to each owner, if allowed, would be too small to enable each to file a separate action.
>
> "3. The only questions of law and fact in this case are common to the entire proposed class, in that the sole issue appears to be whether defendant is liable for interest on the money received by it from purchasers of gas pursuant to opinions No. 699, 749 and 770 of the Federal Power Commission and withheld by defendant for a period from December 30, 1975, to July 1, 1980.

> "4. This action should be certified as a class action and the plaintiff class is defined as follows:
>
> > 'All royalty owners and overriding royalty owners to whom Phillips Petroleum Company made suspense royalty payments between December 30, 1975, and July 1, 1980, relating to Federal Power Commissions Opinions 699, 749 and 770 (which includes 699H, 749C and 770A).'
>
> "5. Notice of the pendency of this action, its nature and effects of any judgment shall be given to all members of the class. . . . The defendant shall provide to the plaintiffs a list of all members of the class and their mailing address as shown by defendant's records."

A petition for writ of mandamus to direct the district judge to decertify the class as to all unnamed nonresident plaintiff class members was denied by this court in *Phillips Petroleum Co. v. Duckworth*, Case No. 54,608, June 28, 1982. A petition for *certiorari* from the denial of mandamus was denied by the United States Supreme Court, ... U.S. ....., 74 L.Ed.2d 951, 103 S.Ct. 725 (1983).

In *Shutts I* this court extensively discussed the issue of whether a Kansas court may assert jurisdiction in a plaintiff class action over nonresident plaintiff class members who have no "minimum contacts" with the State. The class action filed in *Shutts I* sought to recover interest on suspense royalties attributable to gas produced from leases in the three-state Hugoton-Anadarko area. The plaintiff, a Kansas resident, was the representative of a class of 6,400 gas royalty owners, only 218 of which were residents of Kansas. While the record did not reflect the number in the plaintiff class residing in other states which held gas leases covering land in Kansas, the largest physical

portion of the Hugoton-Anadarko area was situated in Kansas. 222 Kan. at 537.

In *Shutts I* the court rejected Phillips' contention that the trial court did not have jurisdiction over in personam claims of unnamed nonresident class plaintiffs having no contact with Kansas. In so doing the court first examined the "minimum contacts" requirement established in *Internat. Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), and its progeny, for exercising in personam jurisdiction by a state over a nonresident *defendant.* The court held the "minimum contacts" test is inapplicable to nonresident *plaintiffs* in a class action, reasoning:

> "Whether all *nonresident plaintiffs* in a class action are required to have 'minimum contacts' with the forum is a different matter. Because a class action must necessarily proceed in the absence of almost every class member, we hold the residential makeup of the class membership is not controlling. (Note, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, [25 Hastings L. J. 1411] 1432 [1974].) What is important is that the nonresident plaintiffs *be given notice and an opportunity to be heard and that their rights be justly protected by adequate representation.* These are the essential requirements of due process, and they must be satisfied in any class action by every court, state or federal, regardless of the residence of the absent class members. Therefore, while the essential element necessary to establish jurisdiction over nonresident defendants is some 'minimum contacts' between the defendant and the forum state, *the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process.*" (Emphasis in original.) 222 Kan. at 542-43.

The court discussed the restrictions on access to the federal courts in class action suits, 222 Kan. at 544-45, and cited numerous cases and other authorities which support the view that a state court has the power to bind a nonresident plaintiff class member. 222 Kan. at 543, 547-49. In addition, the court found the case to be "closely analogous" to cases recognizing a class action may be binding on nonresident plaintiffs when a "common fund" is involved and where due process requirements are met. 222 Kan. at 552. In *Shutts I,* as here, Phillips commingled the suspense royalties with its other funds which it used to fulfill all its business obligations, rather than maintaining a separate fund.

Phillips first contends the holding in *Shutts I,* that a state court can exercise jurisdiction over unnamed nonresident class plaintiffs where procedural due process is satisfied, is not in accord with two recent decisions of the United States Supreme Court and should therefore be overruled. See *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 291-92, 62 L.Ed.2d 490, 100 S.Ct. 559 (1980); *Rush v. Savchuk,* 444 U.S. 320, 327, 62 L.Ed.2d 516, 100 S.Ct. 571 (1980). *Woodson* involved the exercise of in personam jurisdiction by a state court over a nonresident *defendant* in a products liability action whereas *Rush* involved the exercise of *quasi in rem* jurisdiction over a nonresident *defendant* in a tort action. Both cases merely reiterate the due process considerations and minimum contacts test set forth in *Internat. Shoe Co. v. Washington,* 326 U.S. at 316, and subsequent cases.

As was the case in *Shutts I,* these cases deal with nonresident *defendants,* not nonresident *plaintiffs.* These cases rely entirely upon discussions of due process contained in *Internat. Shoe; Hanson v. Denckla,* 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228 (1958); and *Shaffer v. Heitner,* 433 U.S.

186, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977), all of which were fully reviewed in *Shutts I*. 222 Kan. at 541-42. No new concepts of due process are presented in *Woodson* or *Rush* which were not considered in *Shutts I* and which would warrant a reversal or modification of the opinion in that case.

The decision of this court in *Shutts I* has been widely cited by other courts in recognizing that where procedural due process guarantees of notice and adequate representation are present state courts are empowered to entertain multistate plaintiff class actions and to issue judgments binding on nonresident class members. See *Miner v. Gillette Co.*, 87 Ill. 2d 7, 12-13, 428 N.E.2d 478 (1981); *In re No. Dist. of Cal. "Dalkon Shield" IUD Products*, 526 F. Supp. 887, 906, n. 79 (N.D. Calif. 1981), *vacated and remanded* 693 F.2d 847 (1982); *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 241-42, 271 N.W.2d 879 (1978); *Katz v. NVF Co.*, 119 Misc. 2d 48, 51, 462 N.Y.S. 2d 975 (1983). See also *Geller v. Tabas*, 462 A.2d 1078, 1083 (Del. 1983). Most authorities are in apparent agreement that due to the representative character of plaintiff and defendant class actions, procedural due process standards govern the power of state courts to bind absent class members. See Restatement (Second) of Judgments § 41 (1982); 3B Moore's Federal Practice ¶ 23.11[5], p. 23-2893 (1983); Newberg on Class Actions § 1206 *et seq.* (1980 Supp.). In Newberg on Class Actions § 1206a, the author comments:

> "Under settled principles of due process, state courts have personal jurisdiction over defendants residing within the territorial limits of the state, and also over nonresident defendants but only when the defendant has some minimal connection to the forum. Multistate class actions, however, fall in a different category from those to which these traditional notions

> of personal jurisdictional limits of state courts over defendants apply. Tests of territorial jurisdictional limits or minimum contacts with the forum are inapplicable and need not be satisfied in order for a state court to issue a judgment, *e.g.* in a plaintiff's class action, which is binding on nonresident members of the class."

Phillips argues the decision in *Shutts I* "ignores the balance between the courts of coequal sovereign states inherent in the federal constitution and recognized by the United States Supreme Court." The appellant refers to the language in *Woodson,* 444 U.S. at 292, that the concept of minimum contacts "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." One commentator agrees that the issue of jurisdiction asserted by state courts in multistate plaintiff class actions must be viewed in the context of our federal system. See Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 Har. L. Rev. 718, 729, 733 (1979). However, as we noted in *Shutts I*, recent United States Supreme Court cases restricting access to the federal courts in class action suits have made it necessary for state courts to hear nationwide class actions:

> "Recently the United States Supreme Court has required plaintiffs to assume the cost of notice in common-question class actions. (*Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 40 L.Ed.2d 732, 94 S.Ct. 2140.) The United States Supreme Court has also refused to aggregate class action claims to meet the $10,000 federal jurisdictional requirements. (*Zahn v. International Paper Co.*, 414 U.S. 291, 38 L.Ed.2d 511, 94 S.Ct. 505; and *Snyder v. Harris*, 394 U.S. 332, 22

L.Ed.2d 319, 89 S.Ct. 1053, reh. denied 394 U.S. 1025, 23 L.Ed.2d 50, 89 S.Ct. 1622.) While the results are supported by the fear of overloading the federal judicial system and the desire not to judicially expand the constitutionally established jurisdictional limits, these recent United State Supreme Court cases have clearly restricted access to federal courts. This suit, for example, could not be brought in a federal court. Furthermore, the FPC does not have jurisdiction over the matter. If the state courts will not hear the matter, who will grant relief?

"If state courts cannot maintain class action suits with nonresident plaintiffs, can the 'small man' find legal redress in our modern society which increasingly exposes people to group injuries for which they are individually unable to get adequate legal redress, either because they do not know enough or because such redress is disproportionately expensive? (See A. Homburger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609, 641-643 [1971].)

"The appellant argues this action should be brought in several different state courts. This risks inconsistent adjudications for a class which is otherwise treated alike. Furthermore, the statute of limitations has run in Oklahoma and Texas. The United States Supreme Court has held the commencement of a class action suit tolls the applicable statute of limitations as to all members of the class. (*American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 38 L.Ed.2d 713, 94 S.Ct. 756, reh. denied 415 U.S. 952, 39 L.Ed.2d 568, 94 S.Ct. 1477; and *Eisen v. Carlisle & Jacquelin*, supra.) However, if in this action Kansas is without jurisdiction over class plaintiffs in other

states, this action would not toll the statute of limitations in those states." 222 Kan. at 544-45.

See also Newberg on Class Actions § 1206c.

These comments are equally applicable to the instant lawsuit. Phillips argues this action should be brought in several different state courts. This is merely an effort to "divide and conquer" as a strategy to avoid liability to individual royalty owners. If state courts cannot entertain class action suits involving nonresident plaintiffs, the effectiveness of the class action machinery is destroyed. Furthermore, the statute of limitations has run in all other states where leases involved in this lawsuit are located. If the in personam claims of nonresident plaintiff class members are dismissed from this action, those persons would be barred from recovering on their claims elsewhere.

This decision does not usurp the authority of other states where leases involved in this lawsuit are located to regulate transactions within their borders as Phillips argues. To our knowledge, no claims for interest on suspense royalties withheld by Phillips under the FPC rulings involved here have been asserted in any other forums on behalf of either individual royalty owners or as a plaintiff class of royalty owners. In Newberg on Class Actions, § 1206d, the author discusses the use of statewide class actions in several states as an alternative to a nationwide class:

> "Several statewide class actions, by definition, create a multiplicity of actions where formerly there was one. The waste of judicial resources in these circumstances is obvious, even assuming the doubtful proposition that plaintiffs and lawyers to represent them will be found who will initiate these state class

actions in all affected states before the statute of limitations period has expired, and that all states with these suits have receptive class rules and will certify appropriate classes. The risk of inconsistent adjudications for a class which otherwise is treated alike, swells with each new statewide class commenced. State courts which have certified multistate classes have generally recognized the unsuitability of requiring a class action to be brought in several different state courts.

"Finally, exclusion of non-residents from the class solely on the ground of their non-residency may be an unconstitutional discrimination against non-residents with respect to access to this state's courts, in violation of the Privileges & Immunities Clause of the United States Constitution. Each state court system, while possessing its own jurisdiction, is nevertheless part of a larger network of courts of the several states."

See also 3B Moore's Federal Practice ¶ 23.35.

Phillips argues that jurisdiction over the nonresident plaintiffs cannot be based on their receiving notice of a class action and failure to opt out of the action, because a state cannot compel a nonresident to take affirmative action to avoid its jurisdiction. This same "bootstrap" argument was rejected by the Court in *Shutts I*:

> "Phillips argues our notice statute which allows a party to 'opt-out' of a class action suit cannot be used to 'bootstrap' jurisdiction of the court. Suffice it to say the federal rules and our rule regarding class actions are the result of a conscious choice to decide between provisions allowing parties to 'opt-out' or 'opt-in.' A determination was made to follow the

'opt-out' procedure to bind the greatest number of people. (See Proposed Rules of Civil Procedure, 39 F.R.D. 69, 105 [1966]; Cohn, The New Federal Rules of Civil Procedure, 54 Geo. L.J. 1204, 1226 [1966]; and Staff Studies Prepared for the National Institute for Consumer Justice on Consumer Class Action, pp. 138, 149 [1972].)

> "Phillips argues our class action statute does not give the putative class member an absolute right to 'opt-out' as does Federal Rule No. 23(c)(2)(A). K.S.A. 60-223(c)(2) provides in pertinent part:
>
> "'. . . [T]he court shall exclude those members who, *by date to be specified*, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. . . .' (Emphasis added.)
>
> "Phillips argues by removing the choice of the putative class member to 'opt-out' of the class, it was the intent of the rule to apply to persons over whom the court already had jurisdiction. We do not think such a convoluted conclusion logically follows. The language simply gives the court the power to deny exclusion to class members, be they residents or nonresidents of Kansas, whose inclusion is essential to the fair and efficient adjudication of the controversy. However, we need not examine this section in great detail. (See Staff Studies Prepared for the National Institute for Consumer Justice on Consumer Class Action, *supra* at 145-146.)." 222 Kan. at 555.

We must next determine whether the procedural due process guarantees of reasonable notice and adequate representation were met. Phillips maintained records in their computer system of the names and addresses of

all royalty owners affected by FPC Opinions Nos. 699, 749 and 770, and the amount of additional royalties paid to each. Pressure-sensitive mailing labels provided by Phillips, listing the known names and addresses of the approximately 33,000 royalty owners, were used by the plaintiffs to send notice of the class action to the potential class members by first class mail. The notices contained a request for exclusion which could be used by the royalty owners to opt out of the class. No notice by publication was used. Those royalty owners who opted out of the class and to whom notice could not be delivered were excluded from the class. Therefore, all royalty owners included in the class received notice and chose to remain in the class. Reasonable notice was given which fully complied with K.S.A. 60-223 and Fed. R. Civ. Proc. 23. The notice satisfied jurisdictional and constitutional due process requirements.

In examining whether adequate representation was accorded the absent resident and nonresident plaintiffs by the named representatives, we are mindful of the following discussion in *Shutts I*:

> "Where inadequate representation is established, courts have denied *res judicata* effect to class action judgments. (See *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497 [N.D. Ill. 1969]; and *Gonzales v. Cassidy*, 474 F.2d 67 [5th Cir. 1973].)
>
> "The class action is premised on the theory that members of the class who are not before the court can justly be bound because the self-interest of their representative coincides with the interest of the members of the class and will assure adequate litigation of the common issues. Where the interests of absent class members have not been adequately represented,

> binding them by the class judgment would seem to offend the requirements of due process. (*Hansberry v. Lee*, [311 U.S. 32, 85 L.Ed. 22, 61 S.Ct. 115 (1940)].) Notice to absent members of the class in this regard is particularly important, for it is the greatest single safeguard against inadequate representation. (*Mullane v. Central Hanover Tr. Co.*, [339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950)].)" 222 Kan. at 556.

In 7 Wright & Miller, Federal Practice and Procedure: Civil § 1765, p. 618 (1972), the author states:

> "In most contexts, notice of the action is the touchstone that satisfies due process; the notice must be sufficient to give the party an opportunity to appear and join in the lawsuit or to challenge the claims of representation . . . . Thus a number of courts have held that the crucial determinant of due process is not notice but whether the putative class plaintiff or plaintiffs will fairly and adequately protect the interests of those whom they claim to represent."

What constitutes adequate representation is a question of fact to be determined by the trial court based upon the circumstances of each case. The decision should not be disturbed on appeal absent a showing of an abuse of discretion. 7 Wright & Miller, Federal Practice & Procedure: Civil § 1765; 3B Moore's Federal Practice ¶ 23.07[1]; *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532, 535, 571 P.2d 345, *rev. denied* 222 Kan. 749 (1977). Moreover, the law does not require that a named plaintiff be the perfect class member or even the best available. In determining the adequacy of the representative the trial court should consider: (1) whether there is adequate competent counsel; (2) whether the litigants are involved

in a collusive suit; (3) whether the interests of the named parties are conflicting with or are antagonistic in any way to the interests of the other members of the class; (4) whether the named representatives' interests are coextensive with the interests of the other members of the class; (5) the quality of the named representatives, not the quantity; and (6) the extent of the named representatives' interests in the suit's outcome. See 7 Wright & Miller, Federal Practice & Procedure: Civil §§ 1765-1769; 3B Moore's Federal Practice, ¶¶ 23.07[1]-23.07[4]; *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d at 535; *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562-63 (2d Cir. 1968); *Miner v. Gillette Co.*, 87 Ill. 2d at 14.

Considering these factors it is clear the class members were competently and adequately represented by the named representatives and their attorneys. The same attorney who was recognized in *Shutts I* as having done a "superior job in bringing this action and in arguing and briefing the law on this appeal" (222 Kan. at 557) represents the named representatives in the instant action. Counsel is said to be qualified to act for the representatives of the class, and therefore the class itself, if he is experienced in the particular type of litigation before the court. 7 Wright & Miller, Federal Practice and Procedure: Civil § 1766, p. 634. There is nothing in the record to suggest the class is not being competently represented by its counsel in this action, nor that the parties are involved in a collusive suit.

The named representatives and class members have identical interests in the lawsuit. Before the named representatives' status can be defeated the defendant must show a conflict exists between the representatives and class members which goes to the very subject matter of the litigation. *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d at 536, and case cited therein. Recovery for interest

on the suspense royalties, which both the named representatives and the class members seek, is the heart of this action. No conflicting or antagonistic interests exist between the representatives and class members.

The coextensiveness factor requires only that the representatives and class members "share common objectives and legal or factual positions." 7 Wright & Miller, Federal Practice and Procedure: Civil § 1769, p. 655; *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d at 536. The fact that a defense may be asserted against the named representatives, as well as some other class members, but not the class as a whole, does not destroy the representatives' status. Here, a coextensiveness of interests exists between the representatives and class members to recover interest which is due them on suspense royalties withheld by Phillips.

The various authorities agree that whether the class members are adequately represented by the named plaintiffs depends on the quality of the representation, rather than the number of representative parties as compared with the total membership of the class. 7 Wright & Miller, Federal Practice & Procedure: Civil § 1766; 3B Moore's Federal Practice ¶ 23.07[4]; *Eisen v. Carlisle & Jacquelin*, 391 F.2d at 562-63. The use of a percentage test to determine whether absent parties will be fairly represented often would work to defeat the purpose of the class action device: to enable litigants with small claims to vindicate their rights. 7 Wright & Miller, Federal Practice & Procedure: Civil § 1766; *Eisen v. Carlisle & Jacquelin*, 391 F.2d at 563. Similarly, the size of the representatives' personal claims should not be dispositive of the question whether the class is adequately represented, since requiring the class representatives to have a large interest in the dispute would thwart one of the basic purposes of such action. 7 Wright & Miller, Federal Practice & Procedure:

Civil § 1767; 3B Moore's Federal Practice ¶ 23.07[4]. The quality of representation embraces both the competence of the legal counsel of the representatives and the stature and interest of the named parties themselves. Generally the representatives must be of such a character as to assure the vigorous prosecution or defense of the action so that the members' rights are certain to be protected. 7 Wright & Miller, Federal Practice & Procedure: Civil § 1766.

It is true the individual interests of the three named representatives are small when compared with the claims of the class as a whole. However, the representatives have sufficiently demonstrated a willingness to pursue this action to assure the class members' rights will be protected. As the named representative in *Shutts I*, Irl Shutts has more than shown his ability to adequately represent the class as a whole and prosecute the action through the entire judicial process to ensure the class members' claims are vindicated. There is nothing to indicate this action would not be pursued as vigorously as the action involved in *Shutts I*.

Based on the foregoing discussions, we find the procedural due process guarantees of reasonable notice and adequate representation were afforded the absent nonresident plaintiff class members.

Phillips contends the instant action should be dismissed because Kansas does not have a "legitimate interest" in entertaining this action. Phillips focuses on the following caveat expressed in *Shutts I*:

> "[T]his opinion should not be read as an invitation to file nationwide class action suits in Kansas and overburden our court system. Concepts of manageability in terms of our Kansas class action statute, the nature

> of the controversy and the relief sought, the interest of Kansas in having the matter determined, and the class size and complexity will have to be applied." 222 Kan. at 557.

Applying these factors, the court stated:

> "Kansas has a legitimate interest in adjudicating the common issue herein because Kansas comprises the largest physical area included in the FPC designated Hugoton-Anadarko area where Phillips is doing business and producing gas which it sells in interstate commerce. All of the gas royalty owners in the Hugoton-Anadarko area have leases with Phillips and a common interest in the money collected by Phillips as 'suspense royalties' from the sale of gas in the designated area. . . . All of the gas royalty owners in the Hugoton-Anadarko area have a right in common with each other, in the equivalent of a common fund, to claim damages for commingling and use of the 'suspense royalties' by Phillips, payable as interest, and they have a contact with Kansas by reason of such common interest." 222 Kan. at 357-58.

Phillips argues that because such a small percentage of the total number of leases involved are located in Kansas, and only a small percentage of the royalty owners affected are residents of Kansas, no "affiliating circumstances" exist which provide Kansas with a legitimate interest in entertaining this action. The factor emphasized in *Shutts I*, that Kansas comprised the largest portion of the areas affected by the FPC orders, is not present here.

Phillips likens the instant action to *Feldman v. Bates Manufacturing Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (1976), which the court in *Shutts I* found presented an "excellent example" of a "*factual situation* in which a

trial judge applying our class action statute should deny certification of a class action, where nonresident plaintiff class members are involved." 222 Kan. at 557. However, the present action, like *Shutts I*, is readily distinguishable from the situation presented in *Feldman*. In *Feldman* a resident of New Jersey brought an action against a Delaware corporation to compel the corporation to convert preferred stock to common stock. Addressing the issue of jurisdiction by the New Jersey court over the class action, the *Feldman* court indicated that without "affiliating circumstances" between *the forum and litigation*, such as a "common trust fund," the judgment in a plaintiff class suit could not bind the nonresident class members. In dismissing the lawsuit for lack of jurisdiction, the court emphasized that the defendant was a Delaware corporation, the defendant was not authorized to do business and had no assets in New Jersey, no "common fund" existed within the state in which the nonresident plaintiff class members had an interest, the nonresident plaintiff class members had no other contacts with the forum, and New Jersey had no special interest in supervising the conduct of the defendant corporation's business which would justify assuming jurisdiction. The fact that only 31 of the 295 class members were residents of New Jersey was not specified by the *Feldman* court as being a significant factor in the decision. The court did emphasize that Delaware, the defendant's domiciliary state, was fully capable of providing a uniform determination of the issues involved. In the case at bar, Phillips, an Oklahoma corporation, conducts business and holds assets in Kansas. The State of Kansas has an interest in supervising the conduct of Phillips' business in this state, and therefore affiliating circumstances exist between the forum and the litigation not present in *Feldman*, which justifies the assertion of jurisdiction by this court over the instant action.

When considering the manageability of class actions filed in our state courts, courts should give equal consideration to all of the factors set forth in *Shutts I*. The interest of the forum in having the matter determined is of no greater significance than the other considerations. As in the prior *Shutts* case, the manageability of this class is demonstrated by the absence of basic issues of fact. The material facts have been stipulated by the parties and the names, addresses and suspense royalty amounts for each royalty owner are readily available in Phillips' records. All royalty owners, regardless of residency, particular lease provisions or royalty agreements, were given the same notices by Phillips and were treated uniformly when suspense royalties and interest were withheld. Although a larger class is involved than in *Shutts I*, the legal issues presented are substantially the same. While these issues are complex they were thoroughly reviewed in *Shutts I*, thereby providing the trial court in the present case with substantial guidelines pertaining to the law applicable to these issues. If anything, this case is more manageable than *Shutts I* because of the legal principles enunciated in that opinion. The nature of the controversy and relief sought are not unfamiliar in this state. Our appellate courts have reviewed numerous cases in recent years involving interest on suspense royalties. *See Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1322 (1977), *cert. denied* 434 U.S. 1067 (1978); *Sterling v. The Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), *cert. denied* 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977), *cert. denied* 434 U.S. 1065 (1978); *Lightcap v. Mobil Oil Corporation*, 221 Kan. 448, 562 P.2d 1, *cert. denied* 434 U.S. 876 (1977); *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532; *Gray v. Amoco Production Company*, 1 Kan. App. 2d 338, 564 P.2d 579 (1977), *modified* 223 Kan. 441 (1978).

Finally, although only a few leases involved in the instant litigation are located in Kansas, hundreds of Kansas resident royalty owners were affected under the three FPC opinions. Many of these Kansas class plaintiffs received royalties from leases located in other states. While this may constitute only a small percentage of the total number of class members, this state has a significant interest in protecting the rights of these royalty owners both as individual residents of this state and as members of this particular class of plaintiffs. Oil and gas production is a significant industry in this state. Kansas has an interest in ensuring that out-of-state oil and gas companies which do business within this state do not conduct themselves unlawfully or violate the rights of resident royalty owners to whom the company is responsible. This action involves the equivalent of a "common fund" because of the suspense royalties commingled and used by Phillips during the pendency of the FPC orders. All of the gas royalty owners involved in this action have the common right to claim damages involving this "common fund." Therefore, all of these royalty owners have a substantial contact with Kansas by reason of their interest in the common fund which is the subject matter of this lawsuit.

Phillips and *amicus* Sun Oil Company also argue that the "commonality" requirement to K.S.A. 60-223(*a*) is not met in this case. Sun Oil Company points to the language in *Shutts I* that "[w]hen liability is to be determined according to varying and inconsistent state laws, the common question of law or fact prerequisite of K.S.A. 60-223 (*a*) (2) will not be fulfilled," 222 Kan. at 557. The *amicus* brief contends "this action involves eleven states and a maze of different interest laws."

As we have heretofore noted, common questions of fact and law exist in this case. All of the parties are similarly situated and no basic questions of fact exist, as the material facts have been stipulated by the parties. The subject matter of the litigation is the plaintiff class members' claim for interest on the suspense royalties. The requirement of 60-223(*a*) (2) is couched in the disjunctive: common question of fact *or* law. It does not, therefore, require the presence of both a common question of fact *and* a common question of law. See *Miner v. Gillette Co.*, 87 Ill. 2d at 17; 3B Moore's Federal Practice ¶ 23.06-1; 7 Wright & Miller, Federal Practice & Procedure: Civil § 1763. It has further been recognized that where common questions of fact predominate and conflicting laws apply, the plaintiff class members may be divided into subclasses to which the appropriate laws may be applied. *Miner v. Gillette Co.*, 87 Ill. 2d at 17; 3B Moore's Federal Practice ¶ 23.45[2]; Newberg on Class Actions § 1206h.

Phillips next contends it is not liable for interest on suspense royalties attributable to gas used by Phillips rather than sold to a pipeline company. If the increased rates were disapproved by the FPC, Phillips would not be required to make refunds to purchasers on gas used rather than sold, because no increased rate was actually collected on such gas. Phillips argues, therefore, additional royalties attributable to gas it consumed did not belong to royalty owners until the increased rates were approved by the FPC. Phillips maintains this case is distinguishable from *Shutts I* for this reason and therefore it does not owe interest on additional royalties for gas it used prior to the time the rate was approved.

Relying on *Lightcap v. Mobil Oil Corporation*, 221 Kan. 448, Syl. ¶ 12, the court in *Shutts I* awarded prejudgment interest to royalty owners whose suspense Royal-

ties had been retained and used by the defendant, Phillips Petroleum Company, during the pendency of the FPC rate approval process, based upon the principle that the doctrine of unjust enrichment prevents one from profiting or enriching himself at the expense of another contrary to equity. The court held:

> "Where a party retains and makes actual use of money belonging to another, equitable principles require that it pay interest on the money so retained and used."
>
> "In an action by royalty owners against their producer for interest on royalties held in 'suspense,' pending determination of lawful rates by the Federal Power Commission upon application of the producer for increased rates, it is held that interest on suspended royalties may be recovered for the period of time such royalties remained in the control of, and were available for use by, the gas producer during the pendency of FPC proceedings and related litigation regarding the determination of applicable lawful rates for gas sales, and litigation regarding the determination of issues involved in this appeal, all as more particularly set forth in the opinion." 222 Kan. 527, Syl. ¶¶ 20, 21.

As set forth more fully in the opinion, the court reasoned:

> "In the case at bar, beginning on June 1, 1961, Phillips withheld the share of the class members of the increased gas prices subject to refund. Thereafter, while the FPC slowly ground out FPC Opinion No. 586, Phillips deposited the increased rate monies in its general accounts and commingled them with other funds without giving further notice to the royalty owners. *What is significant is these gas royalty suspense monies never did or could belong to Phillips.* If the FPC disapproved the proposed increased rates the pipeline companies (gas purchasers of Phillips) would receive this suspense money *and the interest which Phillips had agreed to pay by its corporate undertaking.* If the FPC approved the proposed increase rate, the 'suspense royalties' would go to the gas royalty owners.

> . . . .
>
> "[W]e do not believe that Phillips may enrich itself in the absence of any contractual sanction or seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages, expressed in terms of interest. . . .
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> . . . .
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> ". . . Phillips expressly contracted to pay a percentage of the *price received* for the sale of gas on which month-by-month payments to the royalty owner were to be based. Although the money received by Phillips for the sale of gas in excess of the established rates pending FPC determination was subject to possible refund, *none of the excess was contractually excluded from the price received by Phillips and on which payment to the royalty owner was contractually based.* There was no rule or regulation which prohibited Phillips from including the excess in the amount on which calculation of payment to the royalty owner on a month-to-month basis was made. (*Stahl Petroleum Co. v. Phillips Petroleum Co.*, [550 S.W.2d 360 (Tex. Civ. App. 1977)].) But if Phillips chose to withhold payments of contractually owing 'suspense royalties' pending FPC approval, as authorized by prior federal case law, that did not relieve Phillips of its contractual obligation to pay the *price received*

with interest for the period of time the suspense money was held and used by Phillips." (Emphasis in original.) 222 Kan. 559-62.

In its discussion the court pointed out that Phillips made substantial profit from the use of the suspense money during the period in question.

In the present case, as in *Shutts I*, Phillips filed a corporate agreement and undertaking with the FPC, pursuant to 18 C.F.R. § 154.102(c)(2) (1983), to refund, to Phillips' purchasers of gas, *with interest*, the portion of the increased rates not approved by the FPC. The rate of interest applicable under the corporate undertaking in the event of a refund is seven percent (7%) per annum prior to October 10, 1974, nine percent (9%) per annum thereafter until September 30, 1979, and thereafter at the average prime rate, compounded quarterly, as provided by 18 C.F.R. 154.67 (1983).

The trial court made the following ruling on this issue:

"Also, Phillips uses, in some instances, substantial portions of the gas produced in its own operations, and therefore, does not sell to a pipeline company.

"Phillips asserts that as a result of this, the pay adjustments do not necessarily belong to somebody else, but either belong to Phillips as a consumer, in the case of disapproval of the anticipated rate raises, or if approved, to the royalty owners.

"The difficulty with Phillips' position is that they assume, with their contractual or lessee obligations, that by using the gas themselves, they can avoid the obligation imposed under the original Shutts case.

"The court finds no basis to distinguish their obligations when they are their own consumer as a lessee, then when they are, as lessees in good faith, marketing the gas to pipelines or other consumers."

Phillips argues, in substance, that because it did not actually collect the increased price on the gas which it used rather than sold, it was not unjustly enriched by using money potentially belonging to the royalty owners. Phillips distinguishes this case from *Shutts I* because in that case the gas royalty suspense monies never did or could belong to Phillips, as they would either be passed along to the royalty owners if the increases were approved or refunded to the purchasers if disapproved. Here, if the increased rates were disapproved, Phillips would have no obligation to refund any amount to any purchaser on gas it used.

This argument is without merit for several reasons. Phillips acknowledges in its brief that its obligation to pay royalties under the various gas royalty agreements and casinghead gas contracts exists without regard to the actual disposition of the gas. The royalty is based on the volume of gas multiplied by the reference price which exists even if only one Mcf of gas is sold in the designated area. Royalties are paid on gas consumed by Phillips on the basis of prices received from the sale of other gas to a pipeline company. Therefore, whether the gas is consumed by Phillips or sold to a pipeline company, the amount of royalties paid to the royalty owners to whom Phillips accounts is based upon the actual price received by Phillips on the sale of gas as established by the FPC.

It is true that if the increased rates were not approved by the FPC Phillips would not be obligated to make

any refunds to purchasers on the gas it used, since it had not sold such gas and did not receive an increased rate subject to refund. By consuming a portion of the gas received from its leasing operations, however, Phillips became, in effect, the purchaser of that gas. Where, as here, the increased rate is approved by the FPC, Phillips owed additional royalties to the royalty owners based on the increased rates for the period during which the royalties were suspended, *whether the gas was purchased by a pipeline company or consumed by Phillips.*

The retention of the suspense royalties by Phillips pending FPC determination was lawful. (See cases cited at 222 Kan. at 559.) Phillips, however, was not prohibited from paying royalties during the pendency of the FPC determination based on the increased rate on gas it either used or sold. These increased royalties would be subject to refund from future payment of royalties if ultimately the increase was not approved. By choosing to withhold payment Phillips was allowed the use of the suspense monies during the suspension period which rightfully belonged to the royalty owners, and the royalty owners, in turn, were deprived of receiving and using those monies during that time. The trial court expressly found Phillips commingled the suspense monies with the other monies under its control and benefitted from the use of such monies by either investing it or using it as needed for day-to-day business operations. If Phillips had paid the royalty owners the increased rate on a month-to-month basis during the rate approval process, equity dictates it would be entitled to a refund with interest if those rates were disapproved, whether the gas was sold by Phillips to a pipeline company or used by Phillips in its operations. See *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 484 (Tex. 1978).

Conversely, Phillips was not entitled to enrich itself "in the absence of any contractual sanction or seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages, expressed in terms of interest." 222 Kan. at 561.

Phillips contends that because it would not be obligated to refund increased prices to purchasers on gas it used where the increased rates were disapproved, this case falls within the rule of *Columbian Fuel Corp. v. Panhandle Eastern Pipe Line Co.*, 176 Kan. 433, 271 P.2d 773 (1954), which denied payment of interest on an amount due from a gas purchaser under an interim order of the Kansas Corporation Commission. In *Shutts I* this case was distinguished as follows:

> "This answers Phillips' contention that *Columbian Fuel Corp. v. Panhandle Eastern Pipe Line Co.*, 176 Kan. 433, 271 P.2d 773, and other cases prevent the payment of interest on unliquidated sums. In *Columbian Fuel* an interim rate increase was approved by the Kansas Corporation Commission on natural gas sold to the buyer. The buyer was permitted to withhold the increase upon securing a bond. The seller brought suit seeking to collect interest on the amount withheld. This court noted the temporary nature of the Kansas Corporation Commission order and disallowed interest. The court held:
>
> " 'In the absence of an agreement therefor interest may not be recovered on a claim as long as the validity of the claim is unadjudicated and the amount on which interest could be computed, if the claim be declared valid, remains wholly uncertain and unliquidated.' (Syl. 5.)

"Here, of course, an agreement for the payment of interest on the part of Phillips is clearly present. Further, the suspended payments in *Columbian Fuel* did not necessarily belong to another. Here the 'suspense royalties' belong either to the royalty owners or the pipeline companies. Thus we reaffirm our decision in *Lightcap*, [221 Kan.] at 466, distinguishing *Columbian Fuel*." 222 Kan. at 565.

The significant fact distinguishing *Columbian Fuel* from *Shutts I* is also present in this case: that an agreement for the payment of interest on the part of Phillips is clearly present. In addition, in *Columbian Fuel* essential undetermined factors existed, which is not true in the instant case. In that case the main undetermined issues were first, whether the buyer was liable for the cost of gathering and delivering the gas, and second, what was the cost, which involved the question of what factors to consider in determining such cost. Here there was no dispute that if the rate increases were approved by the FPC Phillips was liable to the royalty owners for the additional royalties based on the increased rate, and the amount due each royalty owner in that instance. As such it was not an unliquidated claim and interest could be easily computed.

Whether Phillips sells the gas at the increased price, actually receiving the increased amount, or uses it during the suspension period, it has the benefit of the lower price paid the royalty owners and is enriched by the use of the money until the increase is approved and the increased price is paid out as suspended royalties. Phillips is therefore obligated to pay interest on the additional royalties paid out whether the gas is sold or used.

Phillips next contends it is not liable for interest to some royalty owners under "without interest" and release

clauses contained in casinghead gas contracts entered into with producers from which Phillips purchases gas. One provision permits Phillips to withhold, without interest, monies subject to FPC approval. It reads:

"The price per Mcf that Buyer [Phillips] receives under the 'Sales Contract' is, or may be, subject to regulation by the Federal Power Commission. The phrase 'price per Mcf that Buyer receives,' as used in this contract, shall mean only that portion of the price exclusive of any tax reimbursement then being collected by Buyer under the Sales Contract which is not subject to possible future refund by Buyer. If Buyer is later determined to be entitled to retain all or part of the amount collected subject to refund and is relieved from all further obligation to refund with respect thereto, Buyer shall retroactively recalculate the price payable hereunder and shall pay Seller the difference, *without interest*, between the amount previously paid Seller hereunder and the amount which would have been payable based on the price which Buyer is so permitted to retain." (Emphasis added.)

The second clause purports to extinguish prior claims for money due for gas sold under prior contracts.

Under each of these contracts the producers warrant title to the gas purchased by Phillips. Under many of these contracts Phillips has assumed the producer's responsibility to distribute the royalties from the purchase price of the gas to the royalty owners at the direction of the producer. This provision states:

"For the account and on behalf of Seller, Buyer agrees to disburse such royalties, overriding royalties, bonus payments and production payments, as Seller shall from time to time direct, accruing from the pro-

duction and sale of gas hereunder. Buyer shall deduct such payments from the amounts due Seller hereunder. Seller agrees to indemnify and hold Buyer harmless from loss and damages resulting from payments made pursuant to Seller's direction. Notwithstanding, Seller may elect initially to make all payments accruing from the production and sale of gas hereunder to the owners of all royalties, overriding royalties, bonus payments and production payments and to hold Buyer harmless therefrom in which event Buyer shall have no obligation with respect to disbursement of such payments as first above provided."

The trial court made the following findings of fact and conclusions of law relevant to this issue:

"Gas royalty agreements, casinghead gas purchase contracts, renewal contracts and division orders which purport in any way to relieve Phillips from the payment of interest on suspense royalties are not valid as far as royalty owners are concerned or binding on this court. The purported contracts between gas producers and Phillips should not be binding on the outside royalty owners where Phillips had use of the outside royalty owners' money and paid them no interest. (*Shutts* [222 Kan. at 530, Syl. ¶¶ 21, 22].) The outside royalty owners and the inside royalty owners are in the same class and Phillips owed them the same duties.

"As to the 'without interest' casinghead gas contracts, here again Phillips attempted by contract with the gas purchaser to eliminate its liability for interest. Such contracts are not binding on the outside gas royalty owners for the reasons above stated.

. . . .

"Division orders, unitization agreements, gas royalty agreements, casinghead gas contracts, and any other type agreements which contain a 'no interest clause', whether as to 'inside' or 'outside' royalty owner are attempted unilateral agreements. They do not in any way alleviate the duty of Phillips to pay interest as above set forth. (*Shutts* [222 Kan. 527] and *Maddox*, [222 Kan. 733].)

Phillips contends that based upon these contractual provisions no privity of contract exists between Phillips and the royalty owners and Phillips is responsible only for money owed to the producer (seller) of the gas. Therefore where the contracts exclude the payment of interest to the producer or extinguish a producer's prior claims for money owed under prior contracts, no interest upon additional royalties is owed the royalty owners who are paid by Phillips on behalf of the purchasers.

These casinghead gas contract provisions are similar in many respects to division orders which attempt to unilaterally amend oil and gas leases to deprive the royalty owners of interest held in suspense. In *Maddox v. The Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977), *cert. denied* 434 U.S. 1065 (1978), the court defined a division order as "an instrument required by the purchaser of oil or gas in order that it may have a record showing to whom and in what proportions the purchase price is to be paid. Its execution is procured primarily to protect the purchaser in the matter of payment for the oil or gas, and may be considered a contract between the sellers on the one hand and the purchasers on the other." 222 Kan. at 735. The court held:

"It was the duty of Gulf under the lease contracts it had with its royalty owners to market the gas at

the best prices obtainable at the place where the gas was produced. The insertion in the division orders of matters contrary to the oil and gas leases, or contrary to the law, cannot be unilaterally imposed upon the lessor by the lessee or the purchaser. Here the unilateral attempt by Gulf in the division orders to amend the oil and gas leases, and thereby deprive the royalty owners of interest to which they were otherwise entitled, was without consideration. Therefore, the provisions in the division order regarding waiver of interest are null and void as determined by the trial court." 222 Kan. at 735.

All of the royalty owners involved in this action are paid royalties directly by Phillips, whether under a regular gas royalty agreement between Phillips and the royalty owners or under a casinghead gas contract between Phillips and a producer where Phillips has agreed to assume the producer's duty to pay royalties directly to the royalty owner. As pointed out by Phillips in its brief, the usual pricing provision under the casinghead gas contract is based on the weighted average price received by Phillips in a price reference area from the sale of gas to a pipeline company as established by the FPC. This is the same royalty which would be paid to royalty owners under typical gas royalty agreements between Phillips and the royalty owners.

These casinghead gas contracts are not signed by the royalty owners nor is there evidence of any consideration given for the withholding of additional royalties by Phillips without interest. These contracts are entered into between *Phillips and producers of gas*. Some of these contracts purport to waive any existing claim by the producers against Phillips and allow Phillips to withhold amounts *owed the producers* without interest. However, these pro-

visions, entered into between Phillips and the producers, cannot unilaterally deprive royalty owners of interest which they would otherwise be entitled to receive under casinghead gas contracts in which the provisions do not appear. There is no evidence the producers or Phillips bargained with the royalty owners or gave any consideration for the relinquishment of the right to receive interest on additional royalties withheld by Phillips. These royalty owners were treated by Phillips the same as royalty owners to whom they account under regular gas royalty agreements. In the notices of the suspended payments sent by Phillips to *all* royalty owners, no distinction was made between royalty owners who receive royalties from Phillips under gas royalty agreements and those who receive royalties under casinghead gas contracts. All suspense monies were withheld and paid out to all royalty owners on a uniform basis. All royalty owners were notified of the right to receive the additional royalties during the suspension period if an acceptable indemnity was filed with Phillips. Phillips cannot deprive the royalty owners of their right to interest by entering into contracts with producers of gas purporting to waive the *producer's* right to receive interest. The provisions of the casinghead gas contracts cannot be read to waive the royalty owners' right to receive interest which they otherwise are entitled to where the contracts are not signed by the royalty owners and there is no consideration.

The appellant next contends this court should look to the law of each state where leases involved in this action are located and determine, based on conflict of law principles, whether interest is recoverable on royalties attributable to those leases and the applicable rate of interest under the laws of the states where each lease is located. In *Shutts I* the interest laws of Kansas, Okla-

homa and Texas were held not to apply because the statutes referred to situations where there was no agreement as to the applicable rates of interest. Phillips expressly contracted and agreed to pay a stated interest to gas purchasers on the refunded portions of the increased price, pursuant to the corporate undertaking filed with the FPC. This agreement was found to establish an appropriate measure of damages to be awarded the royalty owners, expressed in terms of interest, for the commingling and use of suspense monies by Phillips. 222 Kan. at 565.

The trial court held the rate of interest to be applied in the instant case, both prejudgment and postjudgment, was the stated rate under the corporate undertaking filed by Phillips with the FPC. The trial court did not determine whether any difference existed between the laws of Kansas and other states or whether another state's law should be applied. Phillips contends the failure to examine the substantive law of other states regarding the award of interest and applicable interest rates violates its constitutional rights.

In *Shutts I* it was held the rate of interest set forth in the corporate undertaking established an appropriate measure of damages to compensate the plaintiffs for the unjust enrichment derived by Phillips from the use of the plaintiffs' money. In the instant case Phillips has not satisfactorily established why this court should not apply the rule enunciated in *Shutts I* and instead look to the law of each state where leases are located to determine whether damages should be based upon a rate different from that set forth in the FPC undertaking. The general rule is that the law of the forum applies unless it is expressly shown that a different law governs, and in case of doubt, the law of the forum is preferred.

16 Am. Jur. 2d, Conflict of Laws § 5. Where a state court determines it has jurisdiction over a nationwide class action and procedural due process guarantees of notice and adequate representation are present, we believe the law of the forum should be applied unless compelling reasons exist for applying a different law. All of the plaintiff class members in this lawsuit were given actual notice that this action was being brought on their behalf in Kansas. The plaintiffs had the opportunity to opt out of the lawsuit, but chose to have their claims litigated in the Kansas courts. We have hereinbefore held the unnamed plaintiff class members were adequately represented in the lawsuit and that the forum has a significant legitimate interest in adjudicating the claims of the class members. The common fund nature of the lawsuit provides an excellent reason to apply a uniform measure of damages to the class as a whole, as each member of the class has been similarly deprived of the rightful use of his or her money. The plaintiff class members have indicated their desire to have this action determined under the laws of Kansas. Compelling reasons do not exist to require this court to look to other state laws to determine the rights of the parties involved in this lawsuit.

Phillips next contends, based upon the "United States Rule" followed in *Shutts I*, that only unpaid principal is owing the plaintiffs and therefore they have no basis upon which to seek recovery for "interest." Addressing this issue, the trial court found:

> "The position of Phillips that no interest is owed but only principal because the payments made must be first applied to interest under the U.S. Rule announced in *Shutts*, [222 Kan. 527], and therefore only principal is left owing, is without merit. The rules

set forth in *Shutts*, [222 Kan. 527], allow a recovery under equitable considerations. Whether the recovery is for interest or principal is merely a strained construction of words. Plaintiffs are entitled to money for Phillips' use of their money, according to 18 CFR Section 154.67. The pleadings on file herein are conformed, if necessary, to meet the evidence presented."

This action is one for damages, expressed in terms of interest, to compensate the plaintiffs for the use of their money by Phillips. No attempt was made by Phillips to compensate the royalty owners for the period of time they were deprived of the rightful use of their money while Phillips benefitted from its use. It is irrelevant whether the plaintiffs' action to recover damages for unjust enrichment was expressed in terms of "damages," "interest" or "principal." Phillips was not misled as to the basis of the plaintiffs' claim by their action framed as one seeking recovery of interest.

Finally, Phillips suggests this court should exercise its supervisory authority and establish guidelines for the award of attorney fees in nationwide class action suits brought in Kansas. Phillips asserts presently the practice in Kansas is for the attorneys representing the class to receive a designated percentage of the amount of the judgment recovered by the class. The amount of attorney fees awarded, however, does not increase the defendant's liability and is taken from the judgment received by the plaintiff class. The district court ruled the amount of attorney fees would be determined following a hearing after the judgment became final. Regarding attorney fees the district court made the correct ruling.

The amount of attorney fees awarded should be within the sound discretion of the trial court based upon guide-

lines established by this court. In 3B Moore's Federal Practice ¶ 23.91, the following criteria are suggested to be considered by the trial court in determining the size of attorney fees to be awarded in a class action:

> "(1) the number of hours spent on the case by the various attorneys and the manner in which they were spent;
>
> "(2) the reasonable hourly rate for each attorney;
>
> "(3) the contingent nature of success;
>
> "(4) the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing [the] amount to which the court has found the attorney reasonable entitled."

Citing *Lindy Bros. Bldrs., Inc. of Phila. v. American R. & S. San. Corp.*, 487 F.2d 161, 166-69 (3rd Cir. 1973). This list of considerations is not exclusive, however. Other considerations include the amount involved, as it determines the risk of the client and the commensurate responsibility of the attorney, and the result of the case, because that determines the real benefit to the client. Of major importance is the consideration of the benefit the lawsuit has produced. 7A Wright & Miller, Federal Practice and Procedure: Civil § 1803, p. 289-90; *Oppenlander v. Standard Oil Company (Indiana)*, 64 F.R.D. 597 (D. Colo. 1974). In *State of Illinois v. Harper & Row Publishers, Inc.*, 55 F.R.D. 221, 224 (N.D. Ill. 1972), the court recognized some attempt must be made by courts to suit the award of fees to the performance of the individual counsel in light of the time spent reaching a settlement, to prevent attorneys from taking advantage of class actions to merely obtain lucrative fees. See also 7A Wright & Miller, Federal Practice and Procedure: Civil § 1803, p. 292.

Even where there has been no objection to the amount of attorney fees requested, it is the responsibility of the court to determine the award to assure that the amount awarded is reasonable. The trial court must hold an evidentiary hearing so that it has before it sufficient information to make a fair and adequate fee award. 3B Moore's Federal Practice ¶ 23.91, p. 23-568. Many recent cases have required attorneys to produce detailed time records indicating the time expended by each lawyer and the nature of work done by each to allow the court to determine, among other things, the necessity for and quality of the work done. See, *e.g., In Re Equity Funding Corp. of America Securities,* 438 F. Supp. 1303 (C.D. Cal. 1977); *Green v. Wolf Corporation,* 69 F.R.D. 568 (S.D. N.Y. 1976). This, however, is only to be used as a starting point to determine the appropriate fee. 7A Wright & Miller, Federal Practice and Procedure: Civil § 1803, p. 267-69 (1983 Supp.). Wright and Miller suggest, in addition, that the court should consider the contingent nature of succeeding in the action, which would be awarded in addition to the allowance for the quality of counsel's work. The reasons for the contingency award are (1) the plaintiffs' lawyer will not receive any compensation until the lawsuit is concluded and then only if he has been successful in securing a judgment for his clients, (2) unless both of these conditions are met the attorney will receive nothing for his efforts and will not be reimbursed for his expenses, and (3) lawyers who actively litigate class action cases largely depend on court-awarded fees for their economic survival. 7A Wright & Miller, Federal Practice and Procedure: Civil § 1803, pp. 274-75 (1983 Supp.).

Finally, where the established guidelines are followed by the district court, appellate review should be limited

to abuse of discretion. *Lindy Bros. Builders, Inc. v. Am. Radiator, Etc.,* 540 F.2d 102, 116 (3rd Cir. 1976).

On cross-appeal the appellees contend the postjudgment rate of interest which should be applied is the statutory postjudgment rate as set forth in K.S.A. 1983 Supp. 16-204, rather than the contractual rate pursuant to the FPC undertaking. This statute provides, in pertinent part:

> "(*c*) Any judgment rendered by a court of this state on or after July 1, 1982, shall bear interest on and after the day on which the judgment is rendered, at the rate of 15% per annum."

In *Shutts I* the court determined that K.S.A. 16-204 (Weeks) required payment of eight percent interest on the judgment until paid. The contractual rate of interest contained in the corporate undertaking was applied only to the prejudgment interest owing from the date of the receipt of the royalties until the date of judgment. Under our holding in *Shutts I* and K.S.A. 1983 Supp. 16-204, Phillips is required to pay fifteen percent per annum simple interest on the total amount of the judgment from the date of the judgment until paid.

Accordingly, the interest payable to the royalty owners in this case is the rate of interest set forth in Phillips' corporate undertaking with the FPC from the time Phillips first held royalties in suspense to the date of the judgment entered by the trial court and postjudgment simple interest at fifteen percent on the total amount of the judgment from the date of the judgment until paid.

The judgment of the lower court is affirmed as modified.

IN THE DISTRICT COURT OF
SEWARD COUNTY, KANSAS

No. 79C113

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

JOURNAL ENTRY OF JUDGMENT

ON the 27th day of January, 1983, this case comes regularly on for hearing and trial. Plaintiffs appear by and through W. Luke Chapin of Chapin, Penny & Goering, Chapin Building, Medicine Lodge, Kansas 67104; Ed Moore, Ginder & Moore, 202 South Grand, Cherokee, OK 73728; and Harold K. Greenleaf, Jr., P. O. Box 1039, Liberal, Kansas 67901. Defendant Phillips Petroleum Company appears by and through T. L. Cubbage, Phillips Petroleum Company, Bartlesville, Oklahoma 74004; James Yoxall, P. O. Box 1278, Liberal, Kansas 67901; Joseph Kennedy and Robert W. Coykendall, Suite 430, 200 West Douglas, Wichita, Kansas 67202.

THEREUPON, parties announce to the court that they are ready for trial; evidence is introduced; and the court takes the matter under advisement, asking for written suggested findings of fact and conclusions of law from the parties.

Thereafter and as of April 1, 1983, the court, having heard the evidence and having received suggested findings and conclusions from the parties, and being well and fully advised in the premises, renders its Memorandum Decision, which is made a part hereof by reference.

The court further finds and concludes as follows:

FINDINGS OF FACT

1) This action was filed in July, 1979, by plaintiff Irl Shutts (Shutts), a resident of Sun City, Barber County, Kansas, and by Robert Anderson and Betty Anderson, who are residents of Guymon, Texas County, Oklahoma. Shutts is the owner of gas royalty interests under five leases owned by defendant, Phillips Petroleum Company, in Texas and Oklahoma. Andersons are owners of gas royalty interests under a lease owned by Phillips in Oklahoma. (Pre-Trial Stipulation No. 1.)

2) This action was filed by Shutts and Andersons in behalf of themselves and all others of Phillips' gas royalty owners and producers seeking to recover interest on monies withheld by Phillips for a period of years pending approval by the FPC and the courts of certain rate increases on gas purchases. (Stipulation No. 2.)

3) The court has ordered that plaintiffs Shutts and Andersons are members of a class of approximately 33,000 royalty owners and overriding royalty owners who received additional or suspense royalties or overriding royalties from Phillips as a result of FPC (FERC) (Opinions Nos. 699, 749 and 770, pertaining to gas rates in nationwide gas rate proceedings. The court determined that producers should not be included in the class. Subsequent to the mailing of first class notice to the 33,000 potential class members, the size of the class was reduced to ap-

proximately 28,100 because approximately 3,400 class members elected to opt out and notice could not be delivered to approximately 1,500 other potential class members. There has been no notice by publication in this case. (Stipulation No. 3.)

4) Beginning with FPC Opinion No. 699, the Federal Energy Commission began rate making nationwide rather than area wide as had been done previously. (Stipulation No. 4.)

5) Payments were suspended in part under FPC Opinion 699 from July, 1974 through July, 1976; notices went to royalty owners according to Roberts Deposition Exhibit 1 in March, 1975; No. 2 in November, 1975; No. 3 in December, 1975; and No. 4 in July, 1976. Total payouts to royalty owners were about $3,700,000.00. (C. A. Roberts Affidavit No. 4, Attachment B.) (Stipulation No. 5.)

6) Payments were suspended in part under Opinion 749 from January, 1976 through February, 1978; notices went to royalty owners according to Roberts Deposition Exhibit No. 7 in April, 1976; No. 8 in September, 1978. Total payouts to royalty owners were about $2,900,000.00. (C. A. Roberts Affidavit No. 4, Attachment B.) (Stipulation No. 6.)

7) Payments were suspended in part under FPC Opinion 770 from August, 1976 through July, 1977; notices went to royalty owners according to Roberts Deposition Exhibit 15 in September, 1977; No. 16 in March, 1978; No. 17 in December, 1978; and No. 18 in March, 1979. Total payouts to royalty owners were about $4,700,000.00. (C. A. Robert Affidavit No. 4, Attachment B.) (Stipulation No. 7.)

8) The increased sales prices for the gas sales were collected by Phillips subject to a duty to refund the same to the purchasers in the event the courts failed to approve the sales price increases ordered by FERC. If the rates were not approved, Phillips would owe the purchasers interest at seven percent (7%) per annum until October 10, 1974, at nine percent (9%) per annum thereafter until September 30, 1979, and at the average prime rate, compounded quarterly, thereafter on all that portion of the increased rate disallowed. (18 CFR 154.67 and Federal Reserve Bulletins.)

9) Until dates of suspension above stated, Phillips paid over to its gas royalty owners all of their fractional or percentage share of the rates being collected by Phillips, but through all or part of the periods of suspension Phillips withheld the royalty payments attributable to the price increases in Opinion Nos. 699, 749 and 770, unless the royalty owners put up an acceptable indemnity to repay the same with interest if the increased values were not approved by FPC; and Phillips so notified all of its royalty owners. A list of indemnity owners (royalty owners and producers) who were paid monies resulting from FPC Opinion Nos. 699, 749 and 770 pursuant to an indemnity agreement is shown at Roberts Deposition Exhibit No. 24 (4 pages). (Stipulation No. 8.)

10) As to all gas royalty owners and overriding royalty owners to whom Phillips was accounting, Phillips collected all proceeds from the proposed increased rates including that fraction or percentage increase which belonged either to royalty owners or to purchasers and could in no event belong to Phillips. The money belonging to others was deposited to cash in Phillips' general account and commingled with its other funds during

the suspension periods. (Barnett Deposition, Pages 4, 6, 7 and 8.)

11) On termination of the suspension periods above stated, Phillips again began paying all of its royalty owners and overriding royalty owners to whom is accounted, royalties based on the increased prices and paid the back royalties or suspense royalties on FPC monies. (Stipulation No. 9.)

12) Irl Shutts and Robert and Betty Anderson were among those royalty owners receiving checks for suspended royalties. (Stipulation No. 10.).

13) At the time of the payouts of suspended royalties and overriding royalties, Phillips neither paid nor offered to pay any interest for the use of the money nor did Phillips in the notice sent with the check say anything about interest or how long the money had been held or used by Phillips. (Phillips Answers to Interrogatories, Set I, Interrogatory No. 5: "Answer: No interest was paid."; see also notices attached to Pre-Trial Order.)

14) The money that Phillips had in its possession due to FPC suspended monies would be commingled with all other monies that Phillips had under its control. (Gerald R. Barnett Deposition, Pages 4 and 7.) "It's our job to see how much money is needed in the bank for day to day operations and then the excess, it's our job to find the appropriate places to invest it for different periods of time. The income off of those investments is reflected as some type of investment income in the annual report. Phillips invests its excess money in substantially numerous different types of investments: commercial paper, C.D.'s, overnight funds, fed funds, treasury bills. Each

day we look at all of those rates and compare what you can get in the different instruments. Whenever Phillips needs money in its general operating account, as when FPC money is to be paid from Phillips to various owners, then, if that requires extra cash from another investment, that investment is liquidated and the money put into the operating account." (Barnett Deposition.)

15) The 1978 annual report of Phillips is a consolidated report of Phillips and its various subsidiaries. Barnett Deposition Exhibit 28, Page 44, shows net income of Phillips increasing from $130,000,000.00 in 1969 to $710,500,000.00 in 1978. On Page 43, it shows total assets increasing from $3,122,000,000.00 in 1969 to $6,935,000,000.00 in 1978. Page 35 shows earnings employed in the business as of the beginning of 1978 as $2,406,000,000.00 as compared to the end of 1978 of $2,931,000,000.00. Page 43 shows stockholders equity increasing from $1,677,000,000.00 in 1969 to $6,935,000,000.00 in 1978. (Barnett Deposition; above pages of annual report attached to Pre-Trial Order.)

16) Phillips had received the increased rates merely by signing an agreement or corporate undertaking with the Federal Power Commission to refund any amounts with interest in accordance with FPC regulations. (Plaintiffs' trial evidence.) However, Phillips required of its Royalty owners a bank letter of credit or a corporate surety bond. (Roberts Deposition, Pages 75-80 and Page 115; Exhibit 25; and Plaintiffs' trial evidence.)

17) The applicable rates of interest which Phillips would have been required to pay pursuant to the corporate undertaking are established by 18 CFR, Section 154.67, as follows:

Until October 10, 1974		7.00%
October 10, 1974 to September 30, 1979		9.00
Oct. to Dec. '79	(June, Jul., Aug. average)	11.70
Jan. to Mar. '80	(Dec., Jan., Feb.)	14.28
Apr. to June '80	(Mar., Apr., May)	15.39
Jul. to Sept. '80	(June, July, Aug.)	18.22
Oct. to Dec. '80	(Sept., Oct., Nov.)	11.74
Jan. to Mar. 81	(Dec., Jan., Feb.)	14.03
Apr. to June '81	(Mar., Apr., May)	19.98
July to Sept. '81	(June, July, Aug.)	18.27
Oct. to Dec. '81	(Sept., Oct., Nov.)	20.31
Jan. to Mar. '82	(Dec., Jan., Feb.)	18.46

(Further rates as determined by Federal Reserve Bulletins.)

18) Gas royalty agreements, casinghead gas purchase contracts, renewal contracts and division orders which purport in any way to relieve Phillips from the payment of interest on suspense royalties are not valid as far as royalty owners are concerned or binding on this court. The purported contracts between gas producers and Phillips should not be binding on the outside royalty owners where Phillips had use of the outside royalty owners' money and paid them no interest. (*Shutts,* supra, Syl. 21 and 22.) The outside royalty owners and the inside royalty owners are in the same class and Phillips owed them the same duties.

As to the "without interest" casinghead gas contracts, here again Phillips attempted by contract with the gas purchaser to eliminate its liability for interest. Such contracts are not binding on the outside gas royalty owners for the reasons above stated.

19) The dates and the amounts of suspense royalties collected by Phillips and the dates and amounts of payments of this money by Phillips are contained in the records of defendant and are readily ascertainable through the use of their computer.

20) Gas producers owe interest to their royalty owners on FPC suspense royalties held and used by the producer (Phillips in this case) as set forth in *Shutts v. Phillips Petroleum Company,* 222 Kan. 527, 567 P.2d 1292, Cert. denied 98 S. Ct. 1246. Interest shall be paid from the time said royalties were received by Phillips until paid to the royalty owners, at the applicable rates set forth above. (See *Shutts,* supra, P. 564.)

21) The position of Phillips that no interest is owed but only principal because the payments made must be first applied to interest under the U S. Rule announced in *Shutts,* supra, and therefore o y principal is left owing, is without merit. The rules set forth in *Shutts,* supra, allow a recovery under equitable considerations. Whether the recovery is for interest or principal is merely a strained construction of words. Plaintiffs are entitled to money for Phillips' use of their money, according to 18 CFR Section 154.67. The pleadings on file herein are conformed, if necessary, to meet the evidence presented.

22) As to all persons furnishing indemnity agreements to Phillips, defendant had use of suspended royalties from the date of receipt by Phillips until date of execution of the agreement and as to the specific property covered by the agreement.

23) As to royalty owners who signed to accept payment without interest, they are estopped from claiming interest.

CONCLUSIONS OF LAW

1) This case is a successor to *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292.

2) It is without question in Kansas that gas producers owe interest to their royalty owners on FPC suspense royalties held and used by the producers. (*Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, Cert. denied 98 S. Ct. 1246; *Gray v. Amoco Production Co.*, 1 Kan. App. 2d 338, 564 P.2d 579; 223 Kan. 441, 573 P.2d 1080; *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326, Cert. denied 98 S. Ct. 1242; *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 634; *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325, Cert. denied 98 S. Ct. 1246; *Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1332, Cert. denied 98 S. Ct. 1246; and *Helmley v. Ashland Oil Co., Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345.

3) The defendant is liable for interest on all royalty and overriding royalty retained by it during the period that royalty was collected and suspended by Phillips pending approval by the FPC (FERC) and the courts of certain rate increases under Opinion Nos. 699, 749 and 770, with the exceptions noted in Findings 22 and 23 above.

4) The applicable rate of interest for which Phillips is liable is seven percent (7%) per annum until October 10, 1974, nine percent (9%) per annum thereafter until September 30, 1979, and thereafter at the average prime rate, compounded quarterly, as provided by 18 CFR 154.67.

5) The period of time for which interest is due shall be calculated from the date or dates said suspense royalty was received by Phillips to the date or dates

said suspense royalty was paid, with the exceptions noted in Findings 22 and 23 above. Following the respective payouts the remaining interest (principal according to the U. S. Rule) shall bear interest according to 18 CFR 154.67.

6) Phillips has or can compile through its data base and computer program all of the necessary information with which to calculate the amount of interest due and owing.

7) Division orders, unitization agreements, gas royalty agreements, casinghead gas contracts, and any other type agreements which contain a "no interest clause", whether as to "inside" or "outside" royalty owner are attempted unilateral agreements. They do not in any way alleviate the duty of Phillips to pay interest as above set forth. (*Shutts*, supra and *Maddox*, supra.) In this case Phillips distinguishes between inside and outside royalty owners, with the inside royalty owners being those lessors with whom Phillips has a direct contract in the usual lease form. The outside royalty owners represent those royalty owners in which Phillips buys gas production from a producer and has the obligation to make royalty payments to those owners as designated by the producers. Also, Phillips uses, in some instances, substantial portions of the gas produced in its own operations, and therefore, does not sell to a pipeline company.

Phillips asserts that as a result of this, the pay adjustments do not necessarily belong to somebody else, but either belong to Phillips as a consumer, in the case of disapproval of the anticipated rate raises, or if approved, to the royalty owners.

The difficulty with Phillips' position is that they assume, with their contractual or lessee obligations, that

by using the gas themselves, they can avoid the obligation imposed under the original Shutts case.

The court finds no basis to distinguish their obligations when they are their own consumer as a lessee, than when they are, as lessees in good faith, marketing the gas to pipelines or other consumers.

8) All findings and orders set forth in the journal entry certifying the class are incorporated herein.

9) Excluded from this judgment are those parties who have filed herein their exclusion and those parties who did not receive notice.

10) Interest statutes in other states are not applicable here. (*Shutts*, supra, Page 563-566.)

11) Interest following date of judgment will be at the average prime rate compounded quarterly as provided by 18 CFR 154.67.

12) The court hereby directs the entry of a final judgment upon the issues of liability as determined herein and finds that there is no just reason for delay, in accordance with K.S.A. 60-254(b).

13) The issue of attorney fees is reserved pending the accounting of money due and a further hearing on the same.

/s/ Keaton G. Duckworth
Keaton G. Duckworth
District Judge

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IN THE
DISTRICT COURT OF SEWARD COUNTY, KANSAS

Case No. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A,
Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

AFFIDAVIT NO. 4

STATE OF OKLAHOMA)
) SS.
COUNTY OF WASHINGTON)

C. A. Roberts, of Bartlesville, Oklahoma, being first duly sworn, deposes and states under oath the following facts:

1. That the following is based on Affiant's own personal knowledge, and is submitted for use and for any lawful purpose on behalf of defendant Phillips Petroleum Company in the above styled and numbered case (hereinafter called *"Shutts II"*).

2. That Affiant is: an employee of Phillips Petroleum Company where he serves as gas royalty administrator; and that he has had that position since 1974; and that the

duties of such position included responsibility for coordinating the payment of additional monies to Phillips' royalty owners (i.e., Phillips' lessors, outside lessors to whom Phillips accounts, and all overriding royalty interest owners) following the finality of Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A.

3. That Affiant has requested and received an unaudited summary of the additional monies paid which shows for each Opinion: (1) the number and the domicile of the leases to which the money is attributed and the amounts attributed by state; and (2) the number and the domicile of the payees of the money and the amounts paid by state. These summaries were derived from the accounting business records of Phillips Petroleum Company. The summary of said information appears as Attachments A and B.

4. Further affiant saith not.

/s/ C. A. Roberts
C. A. Roberts

Sworn to and subscribed before me this 1st day of April, 1982.

/s/ Patsy Graham
Notary Public

My commission expires: June 22, 1984.

Attachment A

PHILLIPS PETROLEUM COMPANY

Represents a schedule of values applicable to leases domiciled by State Federal Power Commission Opinion Nos. 699, 749 and 770

Lses. Domicile	Opinion 699		Opinion 749		Opinion 770	
States	# Owners	Value	# Owners	Value	# Owners	Value
Oklahoma	1,266	$ 83,711.35	1,948	$ 243,163.49	1,430	$ 471,122.53
Texas	4,414	839,152.73	3,479	2,171,217,36	3,702	2,615,744.46
Kansas	3	152.88	15	2,619.24	4	115.10
Arkansas	6	3,228.22	32	1,769.33	2	552.83
Louisiana	68	2,187,548.06	178	352,539.45	26	516,248.13
New Mexico	941	433,574.85	350	22,670.27	591	194,799.95
Illinois	—	—	1	1.30	1	.01
Wyoming	690	148,906.93	68	67,570.01	476	945,441.09
Mississippi	—	—	3	694.93	—	—
Utah	—	—	1	184.60	—	—
W. Virginia	—	—	32	10,364.61	—	—
No State Code	1	[.05]	2	1,032.59	—	—
	7,389	$3,696,274.97	6,109	$2,873,827.18	6,232	$4,744,024.10

Attachment B

PHILLIPS PETROLEUM COMPANY

Represents a schedule of values paid and/or accrued to owners pursuant to Federal Power Commission Opinion Nos. 699, 749 and 770 Domiciled by Location

State	Opinion 699		Opinion 749		Opinion 770	
	# Owners	Value	# Owners	Value	# Owners	Value
Alaska	33	$ 1,261.15	14	$ 97.55	20	$ 399.76
Alabama	45	4,553.13	44	886.70	39	3,178.19
Arizona	226	14,930.86	206	12,579.62	207	23,427.35
Arkansas	173	2,399.71	171	7,764.09	162	8,967.61
California	1,604	46,702.19	1,374	55,341.35	1,331	178,190.28
Colorado	505	189,660.33	367	88,652.58	485	164,784.52
Connecticut	54	507.02	86	1,143.92	56	2,449.32
Dist./Columb.	47	1,064.66	45	536.56	39	6,862.53
Delaware	31	10,457.02	18	212.48	19	237.04
Georgia	45	1,377.18	50	2,310.43	43	2,068.09
Florida	272	9,260.13	307	28,603.17	239	8,649.57
Hawaii	5	10.92	14	235.71	11	191.54
Iowa	182	2,344.80	180	12,682.50	176	6,237.64
Idaho	24	424.90	23	402.11	26	1,900.86
Illinois	397	25,090.75	357	36,473.09	353	44,312.58
Indiana	87	786.52	80	10,028.69	74	2,385.15
Kansas	496	9,281.75	553	37,818.00	504	75,538.65
Kentucky	47	584.46	50	111.73	43	956.65
Louisiana	1,244	1,688,366.22	740	246,607.09	361	434,741.61
Massachusetts	56	821.82	42	3,450.80	35	3,738.12
Maryland	52	3,660.63	49	1,413.34	49	4,204.97
Maine	11	92.51	11	3.18	4	458.05
Michigan	75	6,245.84	65	5,916.08	68	4,355.96
Minnesota	104	3,072.74	69	2,297.24	87	5,098.68
Missouri	276	13,840.43	269	54,601.95	240	72,234.27
Mississippi	67	6,069.39	88	1,327.41	36	16,649.38
Montana	53	1,521.94	22	316.85	32	1,483.82
N. Carolina	61	2,248.09	39	1,110.52	39	1,158.65
N. Dakota	8	17.60	5	69.39	8	475.47

Attachment B (Continued)

PHILLIPS PETROLEUM COMPANY

Represents a schedule of values paid and/or accrued to owners pursuant to Federal Power Commission Opinion Nos. 699, 749 and 770 Domiciled by Location

State	Opinion 699		Opinion 749		Opinion 770	
	# Owners	Value	# Owners	Value	# Owners	Value
Nebraska	86	$ 1,399.95	43	$ 2,326.33	72	$ 7,306.08
New Hampshire	11	307.83	11	502.38	10	542.58
New Jersey	72	977.67	117	994.62	66	7,840.84
New Mexico	621	315,856.87	339	26,535.79	469	157,151.47
Nevada	56	1,516.14	49	2,143.52	51	3,753.41
New York	498	50,952.57	469	16,541.33	388	44,093.58
Ohio	84	837.33	105	4,166.51	74	6,844.23
Oklahoma	2,653	191,587.09	3,591	575,513.32	2,684	573,614.01
Oregon	135	2,562.96	111	2,253.51	123	14,484.55
Pennsylvania	192	2,233.57	159	4,412.98	160	1,353.29
Puerto Rico	—	—	—	—	—	—
Rhode Island	10	35.82	15	2.19	8	602.15
S. Carolina	29	410.57	27	660.43	24	309.35
S. Dakota	24	514.35	19	68.04	18	3,131.68
Tennessee	74	16,353.07	53	2,009.66	45	1,803.87
Texas	9,591	940,100.88	7,881	1,521,407.32	8,550	2,216,033.23
Utah	29	1,518.84	18	354.93	18	4,626.62
Vermont	8	96.63	11	248.38	7	939.07
Virginia	78	989.98	84	2,290.36	71	1,893.22
Virgin Islands	—	.28	1	22.50	1	.30
Washington	143	3,327.72	131	2,992.82	135	27,971.93
Wisconsin	87	929.22	89	5,740.29	88	13,926.50
W. Virginia	20	5,374.18	246	7,118,14	22	294.64
Wyoming	413	79,232.83	37	52,091.05	272	552,104.63
Foreign	109	2,436.82	69	761.81	110	828.33
	21,303	3,666,207.86	19,013	2,844,152.34	18,252	4,716,785.87
Unmatched Owners	1,025	30,067.11	1,553	29,674.84	1,046	27,238.23
	22,328	$3,696,274.97	20,566	$2,873,827.18	19,298	$4,744,024.10

KAN. STAT. ANN. § 60-223

Class actions. (a) *Prerequisites to a class action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class actions maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The interest of members of the class in prosecuting or defending

separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action.

(c) *Determination by order whether class action to be maintained; judgment; actions conducted partially as class actions.*

(1) As soon as practicable after the commencement and before the decision on the merits of an action brought as a class action, the court shall determine by order whether it is to be maintained as such. Where necessary for the protection of a party or of absent persons, the court, upon motion or on its own initiative at any time before the decision on the merits of an action brought as a non-class action may order that it be maintained as a class action. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) The judgment in an action maintained as a class action shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them.

In any class action maintained under subdivision (b)(3), the court shall exclude those members who, by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.

(3) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues such as the issue of liability, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall then be construed and applied accordingly.

(d) *Orders in conduct of actions.* In the conduct of actions to which this section applies, the court may, without limitation, make appropriate orders: (1) Settling the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, or to include such allegations, and that the action in either case proceed accordingly. The orders may be combined with an order under K.S.A. 60-216, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or compromise.* An action brought as a class action, whether or not ordered to be maintained as provided in paragraph (1) of subsection (c), shall not be dismissed or compromised without the approval of the court, and the court in its discretion may order that notice of a proposed dismissal or compromise be given to the class in such manner as the court may direct.

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

In compliance with this Court's Rule 28.1., a list of corporations in which Phillips Petroleum Company holds less than a 100% interest follows: Acurex Corporation; Aero Oil Company; Alyeska Pipeline Service Company; Arctic LNG Transportation Company; Bonny LNG Limited; Bruin Carbon Dioxide Sales Corporation; Calatrava Empress Para la Industria, Petroquimica, S.A.; Canada Western Cordage Co., Ltd.; Canyon Reef Carriers Inc.; Chisholm Pipeline Company; Cochin Refineries Ltd.; Colonial Pipeline Company; Compagnie Francaise du Carbon Black S.A.; Dixie Pipeline Company; Drisco S.A. de C.V.; Everglades Pipeline Company; Explorer Pipeline Company; Insurance and Reinsurance Brokers, Ltd.; Iranian Marine International Oil Company; Kaw Pipe Line Company; Kenai LNG Corporation; LeeFac, Inc.; Negromex S.A.; Newmont Mining Corporation; Nordisk Philblack AB; Norland GmbH; Norpipe A/S; Norpipe Petroleum U.K. Ltd.; Norsea Gas A/S; Norsea Gas GmbH; Norsea Pipeline Ltd.; Papago Chemicals, Inc.; Petrochim; Phillips Carbon Black Limited; Phillips Carbon Black Company (Pty.) Ltd.; Phillips Carbon Black Italiana S.P.A.; Phillips Gas Supply Corporation; Phillips Imperial Petroleum Limited; Phillips Pacific Chemical Company; Phillips Petroleum Singapore Chemicals (Private) Limited; Philmac Oils Limited; Plasticos Vanguardis S.A.; Polar LNG Shipping Corporation; Polyolefins; Quimica Veneco C.A.(b); Renolit Fertighaus GmbH; Salk Institute Biotechnology Industrial Assoc. Inc.; Seadock, Inc.; Seaway Pipeline Inc.; Sevalco (Holdings) Limited; SPODCO Ltd.; Venezoil, C.A.; Texas Offshore Port, Inc.; Transatlantic Reinsurance; Western Desert Operating Petroleum Company; White River Shale Oil Corporation.

(2)

No. 84-233

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner
v.
IRL SHUTTS, *et al.*,
Respondents

Petition for a Writ of Certiorari to the Kansas Supreme Court

BRIEF AMICUS CURIAE OF AMOCO PRODUCTION COMPANY IN SUPPORT OF THE PETITION FOR CERTIORARI

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12 pp

QUESTIONS PRESENTED

1. May a state court in a nationwide class action, consistent with the due process clause, assert jurisdiction over unnamed class members whose transactions arose entirely in other States and who are non-residents, neither having contacts with the forum nor having affirmatively consented to the forum's jurisdiction?

2. May a state court in a nationwide class action, consistent with the due process and full faith and credit clauses, apply its own law to transactions to which the forum has no connection, occurring between non-residents in other States?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-233

PHILLIPS PETROLEUM COMPANY,
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v.

IRL SHUTTS, *et al.*,
Respondents

Petition for a Writ of Certiorari to the Kansas Supreme Court

BRIEF AMICUS CURIAE OF AMOCO PRODUCTION COMPANY IN SUPPORT OF THE PETITION FOR CERTIORARI

INTEREST OF AMICUS CURIAE

Amoco Production Company (Amoco) is a defendant in a nationwide class action suit brought by a single natural gas royalty owner in a state court of Kansas. Like the instant litigation (*Shutts II*), the class action against Amoco involves natural gas properties in ten States, albeit significantly more of the transactions (around 33% of the leases, but less than 20% of the money) have a Kansas connection. Like petitioner Phillips Petroleum, Amoco did not forward royalty payments related to nationwide price increases until it was certain that rates under the Natural Gas Policy Act of 1978 were not subject to refund. Once the price increases were finalized, Amoco promptly forwarded the accrued (suspense) royalties.

Unlike Phillips, Amoco made no attempt to withhold interest on the suspense royalties. Amoco forwarded to its royalty owners not only the suspense royalties, but

also interest based on the applicable statutes of the States in which the leases are situated.

Because the Kansas Supreme Court had previously indicated a willingness to hear nationwide class action suits under somewhat similar circumstances and apply Kansas law both to the applicable rate of interest and to whether interest on interest was payable, *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977) *cert. denied*, 434 U.S. 1068 (1978) (*Shutts I*), the class suing Amoco alleges that additional payments, based on Kansas law, not local law, are due to members of the class. This suit, *T.A. Dudley v. Amoco Production Company*, Case No. 80 C 34 (26th Judicial District Court, Stevens County Kansas) is currently at the class notice stage. Based on *Shutts I* and the instant case, *Shutts II*, there is every reason to believe that despite the fact Amoco forwarded the applicable interest to its royalty holders and Phillips did not, the rule in *Shutts II* will be applied to the approximately $6 million in suspense royalties having no connection with Kansas (beyond the fact of the litigation).

ARGUMENT

The instant case involves the twin plaintiff juggernauts of (1) a nationwide class action where the vast majority of the class members have *no* contact whatsoever with the forum and (2) pure forum shopping choice of law selection. Separately each raises substantial problems. *Miner v. Gillette Co.*, 87 Ill.2d 7, 428 N.E. 2d 478 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*, 459 U.S. 86 (1982); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). In tandem their effect is devasting, guaranteed to produce unexpected, unprincipled, and unconstitutional results.

The importance of the nationwide class action issue has already been recognized by this Court. The decision below, *Miner*, *Stutts I*, and others like them have flatly stated that *International Shoe Co. v. Washington*, 326

U.S. 310 (1945) is limited to defendants only and that recent decisions emphasizing the importance of that case's minimum contacts rationale are similarly limited. Not unnaturally State courts are divided on such an important jurisdictional question affecting the entire Nation. Thus this Court granted certiorari in *Miner* to decide this important issue. After briefing and oral argument, *Miner* was dismissed for want of a final judgment. 459 U.S. 86 (1982). No such problems exist here. Furthermore, even if the judgment in *Miner* had been final, the instant case is a vastly superior vehicle to *Miner* for plenary review because the decision below illuminates a further danger of the nationwide class action: in order to make such suits manageable a forum may choose to apply its own law to transactions whose sole connection with the forum is the presence of unnamed non-resident plaintiffs who do not opt out.

Shutts II, like *Miner*, concluded that *International Shoe* does not govern the question of whether jurisdiction could be obtained over non-resident, non-responding plaintiffs having no contacts with the forum. But then *Shutts II* goes well beyond *Miner*, which had held that sub-classes would be necessary depending on differing local laws,[1] by concluding that Kansas law would govern all transactions, wherever occurring, because the named plaintiffs[2] had selected Kansas as the forum.[3] Only "compelling" reasons can change this and the court need not—and apparently will not—look for them. Kansas has thus concluded that it has the power to police transactions in

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[1] If "the trial court finds that such subclasses of laws may be made, then the common question of fact will necessarily prodominate [sic] and the statutory requirement will be satisfied." 428 N.E.2d at 484.

[2] Or plaintiff, as is the case in the *Dudley* litigation.

[3] *Shutts I* foreshadowed this when the court chose to apply Kansas interest law to suspense royalties involving certain counties in the Hugoton-Anadarko Basin of Texas, Oklahoma, and Kansas (albeit the largest area of the basin is in Kansas).

Texas, Oklahoma, and Louisiana (to take just the three States most involved with the substantive question of interest on suspense payments) and bind those States to Kansas law even though it would have been impossible for the leasing parties at the time the leases were executed to foresee such a result and even though the laws of the other States would produce different results. It is easy to demonstrate that in our federal system the Kansas result can not stand.

As the plurality in *Hague* noted, "a State which has had no significant contact or significant aggregation of contacts, creating state interests with the parties and the occurrence or transaction" may not impose its rule on others. 449 U.S. at 308. Just what are the Kansas interests? First, and legitimately, Kansas has a strong interest in protecting Kansas residents. Second, and equally legitimately, Kansas has a strong interest in policing transactions in Kansas regardless of the residency of the parties. But these two strong interests account for less than 3% of the entire suit. The court below brought in the other 97%—despite a total lack of contacts with the forum—with two more alleged interests. The first added interest was adjudicating claims of class members having no contact with Kansas beyond this case because they had the desire to see Kansas law applied to their transactions. The second was the fact that the defendant does business in Kansas.[4]

These two additional interests are simply insufficient under *Hague* to authorize displacement of the laws of the

[4] The latter point was buttressed by statements concerning a "common fund," a legal fiction used to shore-up both the jurisdictional and choice of law conclusions. Apparently the "common fund" then justifies the bootstrap that since Phillips is in Kansas, it follows naturally that the "common fund" is too. Why this fiction assists the Kansas choice of law conclusion is unclear since one would expect that if the "common fund" exists it would be controlled not by the State of litigation, but by either the law of the State of incorporation or that of the State of principal place of business, Delaware and Oklahoma respectively.

States most interested in the transaction. Texas, Oklahoma, and Louisiana are major gas producing States with strong public policies governing the relationship of producer to royalty owner.[5] Indeed, following *Shutts I* the Texas Supreme Court has spoken to the very point of interest on suspense royalty payments and held that for Texas leases the Texas statutory rate of interest applies plus interest computed on the interest. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. Sup. Ct. 1978). Oklahoma finds the subject of interest rates to be of such importance that it has a constitutional provision governing it. Oklahoma Constitution, Art. 14 § 2, implemented by 15 Okla. Stat. Ann. § 266 (1982-83 Supp.). Yet amazingly no Oklahoma court has been able to apply its constitution to the suspense royalty problem because all such Oklahoma litigation is now carried on in Kansas.[6] It is not only not compelling to displace the choices of the citizens of other States on matters involving their significant internal industries, it is unconstitutional.[7]

[5] Incredible as it seems when contrasted with the result reached, the Kansas Supreme Court understands precisely this point when the affected State's name is Kansas:

> "While [the Kansas royalty owners] may constitute only a small percentage of the total number of class members, this state has a significant interest in protecting the rights of these royalty owners both as individual residents of this state and as members of this particular class of plaintiffs. Oil and gas production is a significant industry in this state. Kansas has an interest in ensuring that out-of-state oil and gas companies which do business within this state do not conduct themselves unlawfully or violate the rights of resident royalty owners to whom the company is responsible."

Shutts II, Petition for Certiorari at A28.

[6] Named plaintiffs Robert Anderson and Betty Anderson are Oklahoma residents and owners of Oklahoma leases. They had commenced litigation in Oklahoma but dropped it to join Irl Shutts, a Kansan (with leases in Oklahoma and Texas, but not Kansas), when he commenced the instant class action.

[7] See also *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). It would seem to follow *a fortiori* that if the interest of Texas in controlling

Could it be seriously asserted that Kansas could by legislation reach the same result as the Kansas Supreme Court reached? Suppose that after debate the Kansas legislature determines that it should police the suspense royalty practices in all 50 United States jurisdictions of oil companies doing business in Kansas. Accordingly it passes a statute requiring any oil company present within Kansas to conform all transactions involving suspense payments to Kansas law. At the outset it should be noted that the case for sustaining such a law is *greater* than in the instant case. As both *Shaffer v. Heitner*, 433 U.S. 186 (1977) and *Kulko v. California Superior Court*, 437 U.S. 84 (1978) demonstrate, pursuit of a policy specifically declared by the legislature is entitled to more weight than pursuing generalized state interests nowhere found in relevant legislation. Yet even with the added backing of legislation it is inconceivable that Kansas could, consistent with the commerce, due process and full faith and credit clauses, impose its will on the citizens and legislatures of Texas, Oklahoma, and Louisiana. No matter how happy a resident of those States might be that Kansas was attempting to give him a more favorable law than the political process of his home State would, that could not constitute a legislatively valid interest for Kansas to act. Kansas simply lacks any interest in transactions occurring between non-residents, in other States, and affecting Kansas only by the presence of a plaintiff forum shopping for the best available law to govern his transactions.[8] The constitution contains limits on extra-

its oil and gas leases is sufficient to require abstention in a diversity case where the sole risk is misinterpretation of Texas law, the interest of Texas would preclude application of the law of any other State to such a transaction.

[8] Indeed if the class action aspect of this suit were stripped away, it is inconceivable that a Texas resident royalty owner under a lease executed in Texas covering oil and gas rights in Texas could enter Kansas and sue Phillips with the Kansas courts applying Kansas law. The desire of the plaintiff to win an otherwise losing case would not give Kansas cause to apply their law and neither would simple presence by an out-of-state company.

territorial reach. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Home Ins. Co. v. Dick*, 281 US. 397 (1930)

CONCLUSION

Gillette v. Miner involved an important issue, one that will be recurring constantly in state courts. Yet that decision involved no determination of manageability of the class (normally a point of state law). Here, by contrast, the Kansas Supreme Court has solved the manageability problem by the amazing determination that Kansas law governed all the transactions in the United States even though 97% of them lie beyond its borders and involve persons with no contacts with Kansas beyond the receipt of notice of the suit. This presents a major federal question. Obviously, if Kansas can do this on these facts then any other willing State can do the same in a different area. Respect for the sovereign determinations of sister States is hardly promoted by this aggressive parochialism. Even more than in *Miner*, the issues in this case warrant plenary treatment by this Court.

Respectfully submitted,

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No. 84-233

In the Supreme Court of the United States

October Term, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF RESPONDENTS IN OPPOSITION

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Date: September, 1984

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QUESTIONS PRESENTED

1. Can Phillips Petroleum Company, the defendant in a plaintiff class action, assert due process rights of nonresident plaintiff class members?

2. Can a state court having *in personam* jurisdiction over Phillips include nonresident plaintiffs in a class consisting of all of Phillips' gas royalty owners?

3. Can a state court allow interest to all plaintiff class members after giving them first class mail notice, the same as FERC interest rates, even though such rates are different than some of the legal rates in other states where Phillips produces gas?

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In the Supreme Court of the United States

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PHILLIPS PETROLEUM COMPANY,
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IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF RESPONDENTS IN OPPOSITION

The opinion of the District Court of Seward County, Kansas, is included in the Petition, A-48 to A-59. The opinion of the Supreme Court of Kansas, written by Schroeder, Chief Justice, was filed March 24, 1984, and appears in the Appendix to the Petition, A-2 to A-47.

NATURE OF THE CASE

The following is quoted from the Kansas Supreme Court opinion, Page A-7:

> "This is a class action suit brought against Phillips Petroleum Company (Phillips) by Irl Shutts, Robert Anderson and Betty Anderson, individually and on behalf of 28,100 royalty owners, including those who are not residents of Kansas, for recovery of interest on 'suspense royalty' on gas produced from leases in eleven states. These royalties were withheld by Phillips at various times from July, 1974 to February, 1978, under three Federal Power Commission (FPC) opinions pertaining to gas rates in *nationwide gas rate proceedings* (emphasis supplied), and later paid by Phillips to the royalty owners without interest. The trial court determined (1) the class consisted of all royalty owners and overriding royalty owners who received suspense royalties from Phillips, whether or not they were residents of Kansas, (2) Phillips was liable for interest on all royalties and overriding royalties retained by it under the FPC opinions, and (3) the applicable rate of interest owed on the suspense royalty payments" (seven percent (7%) per annum until October 10, 1974, nine percent (9%) per annum thereafter until September 30, 1979, and thereafter at the average prime rate, compounded quarterly, as provided by 18 CFR 154.67.) (Petition A-56).

This case is identical to another plaintiff class action against Phillips, *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, cert. denied, 434 U.S. 1068, U.S. rehearing denied, 435 U.S. 961 (*Shutts I*), with the exception that FERC (FPC) made rates nationwide commencing with

Opinion 699 in July, 1974, rather than area wide as previously.

Other almost identical cases are:

Maddox v. Gulf Oil Corp., 222 Kan. 733, 567 P.2d 1326, cert. denied, 434 U.S. 1065, 55 L.Ed.2d 766, 98 S.Ct. 1242;

Sterling v. Superior Oil Co., 222 Kan. 737, 567 P.2d 1325, cert. denied, 434 U.S. 1067, 55 L.Ed.2d 769, 98 S.Ct. 1246;

Nix v. Northern Natural & Mobil, 222 Kan. 739, 567 P.2d 1322, cert. denied, 434 U.S. 1067, 55 L.Ed.2d 769, 98 S.Ct. 1246.

Action was filed in July, 1979, by Irl Shutts, a resident of Kansas, and Robert Anderson and Betty Anderson, residents of Oklahoma. Shutts is the owner of royalty interests under five leases owned by Phillips in Texas and Oklahoma. The Andersons are owners of gas royalty interests under a lease owned by Phillips in Oklahoma.

Payments of gas royalties were suspended in part by Phillips under FERC (FPC) Opinion No. 699 from July, 1974 through July, 1976; under FERC Opinion No. 749 from January, 1976 through February, 1978; and under FERC Opinion No. 770 from August, 1976 through July, 1977. Following final approval of price increases, royalties were paid to the royalties owners in the approximate amounts of $3,700,000.00 under Opinion No. 699; $2,900,000.00 under Opinion No. 749; and $4,700,000.00 under Opinion No. 770.

Phillips withheld and used the suspense royalties during the suspension periods, later paying them out to royalty owners without paying or offering to pay interest on the royalties which had been suspended.

The largest number of leases affected under all three opinions are located in Texas and Oklahoma, where the named plaintiffs, Shutts and Andersons, have their oil and gas leases. There were nine other states where Phillips produced gas, including Kansas. Royalty owners under such leases were domiciled in all 50 states and several foreign countries.

ARGUMENT

1. The Due Process Rights Of Nonresident Members Of Plaintiff Class Cannot Be Properly Asserted By Phillips.

The due process rights of nonresident members of plaintiff class cannot be properly asserted by Phillips.

Even though there have been many class actions in U.S. courts and state courts where nonresident plaintiff class members have been included, Phillips contends that the Kansas court cannot now include nonresident members in the plaintiff class.

In this case, all of the plaintiff class has received first class mail notice and have chosen to stay in the case, subject to the jurisdiction of the Kansas court. They have received judgment for all they sought to recover.

Now, Phillips claims that the nonresidents, 97% of the plaintiff class, should not have been included and Phillips should not be liable to them.

As a general rule, however, "one may not claim standing in this court to vindicate the constitutional rights of some third party." *Singleton v. Wulff,* 428 U.S. 106, 114 (1976), quoting *Barrows v. Jackson,* 346 U.S. 249, 255 (1953). The purpose behind this rule is two-fold:

> "First the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights." (*Singleton v. Wulff,* 428 U.S. at 113-114.)

This brief represents both resident and nonresident class members. The nonresident class members do not want to be excluded. They do not want Phillips arguing "for" them. They want to be left in the case and have the benefits of the judgment that they obtained, the best possible judgment they can obtain.

Speculative claims of future harm ought not to be addressed by this court until such harm occurs. (*Golden v. Zwickler,* 394 U.S. 103 (1969), particularly where such claims are based on issues of constitutional significance.)

(*Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341, 346-48 (1936).)

This Court has ruled many times on the question of whether a judgment in a plaintiff class action would be binding upon class members who were not residents of the forum state. (See *Hansberry v. Lee,* 311 U.S. 32 (1940); *Sovereign Camp of the Woodmen of the World v. Bolin,* 305 U.S. 66 (1938); *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356 (1921); *Hartfold Life Insurance Co. v. Barber,* 245 U.S. 146 (1917); *Supreme Council of the Royal Arcanum v. Green,* 237 U.S. 531 (1915); *Hartford Life Insurance Co. v. Ibs,* 237 U.S. 662 (1915).)

Phillips does business in Kansas and has been duly served with process in Kansas. No question is asserted as

to the jurisdiction of the trial court or the Supreme Court over Phillips or the trial court's power to enforce a judgment against Phillips.

Accordingly, both because there is no present deprivation of any right of a plaintiff class member and also because Phillips lacks standing to argue the due process rights of its adversaries, this court should decline to review the constitutional question presented.

2. Procedural Due Process Standards And Adequate Representation Give State Courts Power To Bind All Plaintiff Class Members, Resident And Nonresident, By A Final Judgment.

In *Newberg on Class Actions*, 1980 Supplement, Section 1206, it is said:

"It has long been recognized that a state court judgment in a proper class action will be binding on all class members—including resident and nonresident members alike. Recent Supreme Court decisions restricting access to federal courts for class actions when claims of individual members are under $10,000.00 each (*Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053; and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511) have caused litigants similarly situated to turn more frequently to state forums to redress their common grievances . . . as will be seen, class actions are inherently representative actions which proceed on behalf of and in the absence of class members similarly situated . . . procedural due process standards governing the power to bind absent class members in a representative action differ significantly from those governing conventional actions."

Shutts I, supra, held that "the residential makeup of the class membership is not controlling. . . . while the essential element necessary to establish jurisdiction over nonresident defendants is some 'minimum contact' between the defendant and the forum state, the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process." Citing *Hansberry v. Lee,* 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22, 132 ALR 741.

The Kansas Supreme Court in *Shutts I,* also went on to hold that many courts in other states have reached out to bind nonresident plaintiffs.[1]

The Restatement of the Law of Judgments states:

"Section 26 Representative or Class Actions.

"Where a class action is properly brought by or against members of a class the court has jurisdiction by its judgment to make a determination of issues involved in the action which will be binding as res judicata upon other members of the class, although such members are not personally subject to the jurisdiction of the court."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318, 94 L.Ed. 865, 70 S.Ct. 652 (1950) recognized the power of a state court to bind nonresidents having no connection with the forum other than as beneficiaries of a trust.

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1. *Chance v. Superior Court,* 58 Cal. 2d 275, 23 Cal. Rptr. 761, 373 P.2d 849 (1962); *Daar v. Yellow Cab Co.,* 67 Cal. 2d 695, 63 Cal. Rptr. 724, 433 P.2d 732 (1967); *Horst v. Guy,* 211 N.W.2d 723 (N.D. 1973); *4 Wright & Miller Federal Practice & Procedure,* Section 1124 (1969); *Philadelphia Electric Co. v. Anaconda American Brass Co.,* 43 FRD 452; *City of Philadelphia v. Morton Salt Co.,* 248 F.Supp. 506; Professor Moore, *3B Moore's Federal Practice,* Section 23.11(5).

Shutts I has been widely cited by other authorities since handed down in 1977.[2]

In *Keeton v. Hustler Magazine, Inc.*, (1984) 104 S.Ct. 1473, this Court said:

> ". . . we have not to date required a plaintiff have 'minimum contacts' with the forum state before permitting that state to assert personal jurisdiction over a nonresident defendant . . ." (104 S.Ct. at 1480-81.)

As held in this case by the Kansas Supreme Court:

"Where the procedural due process guarantees of notice and adequate representation are present, Kansas courts may exercise jurisdiction over nonresident plaintiffs . . . (Syl. 2, Pet. A-2.)

3. Commonality Of Interests Of Residents And Nonresidents.

Commonality of interests of plaintiff class members, resident or nonresident, is well documented and shown, whether or not "minimum contacts" are present.

There are many affiliating circumstances in this case that show the commonality of interests of the plaintiff class:

1. All of them are gas royalty owners of Phillips whose names and addresses have been furnished by Phillips from its records.

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2. See *Miner v. Gillette Co.*, 87 Ill. 2d 7, 12-13, 428 N.E.2d 478 (1981), cert. dismissed, 459 U.S. 86; *In Re No. Dist. of Cal. "Dalkon Shield" IUD Products*, 526 F.Supp. 887, 906 N. 79 (N.D. Calif. 1981), vacated and remanded, 693 F.2d 847 (1982); *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 241-42, 271 N.W.2d 879 (1978); *Katz v. NVF Co.*, 119 Misc. 2d 48, 51, 462 N.Y.S.2d 975 (1983). See also *Geller v. Tabas*, 462 A.2d 1078, 1083 (Del. 1983); Restatement (Second) of Judgments 41 (1982); *3B Moore's Federal Practice*, 23.11(5), p. 23-2893 (1983); *Newberg on Class Actions*, 1206 et seq. (1980 Supp.).

2. Notices of suspension were given by Phillips to all of its gas royalty owners under leases in the eleven state area at the same time.

3. Phillips suspended the royalties at the same time as to its gas royalty owners in the eleven states, including Kansas.

4. Phillips accumulated and used all of the royalties at the same time—not just those of Kansas residents. Thus, the "suspense royalties" are analogous to a "common fund".

5. Phillips paid out the suspense royalties at the same time to all of its gas royalty owners—not on a state by state basis.

6. First class mail notice has been given to all present members of the plaintiff class, about 28,000 of them, and they chose to stay in the Kansas action.

7. Phillips kept its records and treated all of its gas royalty owners alike, regardless of residency. The factual and legal issues are the same as to all of them.

8. FPC (FERC) beginning with its Opinion 699 in July, 1974, regulated rates nationwide, not areawide, and all of Phillips' gas royalty owners were thereby affected.

9. Oil and gas production is a significant industry in Kansas. "The State of Kansas has an interest in supervising the conduct of Phillips' business in this state, and therefore affiliating circumstances exist between the forum and the litigation not present in *Feldman v. Bates Manufacturing Co.*, 143 N.J. Super 84, 362 A.2d 1177." (A-26)

This is the only action filed against Phillips in any of the eleven states where it produces natural gas to collect interest on the FPC (FERC) suspense royalties. It has been more than six years since the last payout in 1978, under Opinion 770. Statutes of limitation have run in the other ten states and this is the only chance that plaintiff class and its members, resident and nonresident, will have to collect interest or damages in the form of interest.

If Phillips could eliminate from plaintiff class all nonresidents of Kansas, then it will have accomplished its objective, reducing recovery in the case to a minimal amount, not worth fighting a class action to recover.

4. Common Fund Class Action Cases Are Analogous.

In *Shutts I, supra* the Kansas court held at 222 Kan. 552:

> "Had Phillips put the 'suspense royalty' into a common trust fund, separate from its operating funds, to be used solely to pay either the pipeline companies or the gas royalty owners once the FPC ultimately decided the rate increase question, this case would dove tail nicely into the 'common fund' cases. Instead Phillips commingled the 'suspense royalty' with its other cash and used the 'suspense royalty' to fulfill all its business obligations. In this manner the 'suspense royalty' which never did or could belong to Phillips, enriched Phillips at the expense of the royalty owners. To hold that Phillips' act of using the money for business purposes, and not putting it into a separate corporate account, takes this case out of the 'common fund' category would reward Phillips' action at the expense

> of innocent gas royalty owners." (Citing *Perlman v. First National Bank of Chicago*, 15 Ill. App. 3d 784, 75 N.E.2d 236.)[3]

5. Miner v. Gillette Co., 87 Ill. 2d 7, 428 N.E.2d 478 (1981), cert. granted, 456 U.S. 914, cert. dismissed, 459 U.S. 86 (1982).

Much was said by Phillips in its Petition for Certiorari attempting to obtain a direction that Judge Duckworth, the trial judge in this case, eliminate nonresident plaintiff class members.[4]

Miner was dismissed by this Court by reason of the fact that there was not yet a final judgment subject to review. Since that time, the nationwide class, residents and nonresidents, was certified by the trial judge in *Miner*, and the case was then settled by Gillette giving to all plaintiff class members prizes or items similar to what they sought to recover in their action.

This case has some similarity to *Miner*, but it consists of Phillips' gas royalty owners, a much more cohesive group with common treatment by Phillips and with common interests, as shown in Section 3 of this brief.

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3. See also:

Hartford Life Ins. Co. v. Ibs, 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165; *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146, 38 S.Ct. 54, 62 L.Ed. 208; *Carpenter v. Pacific Mutual Life Ins. Co.*, 10 Cal. 2d 307, 74 P.2d 761; *Nesbett v. Carpenter*, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182, reh. denied, 305 U.S. 675, 59 S.Ct. 355, 83 L.Ed. 437; *Larson v. Pacific Mutual Life Ins. Co.*, 373 Ill. 614, 27 N.E.2d 458, cert. denied, 311 U.S. 698, 61 S.Ct. 137, 85 L.Ed. 452; *Royal Arcanum v. Green*, 237 U.S. 531, 35 S.Ct. 724, 59 L.Ed. 1089; *Sam Fox Publishing Co. v. U.S.*, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.2d 604.

4. *Phillips v. Duckworth, Judge, et al.*, 103 S.Ct. 725 (1983).

6. As To Interest Rate, Law Of The Forum Should Be Applied Rather Than Laws Of The Eleven States Where Phillips Produces Gas.

The general rule is that the law of the forum applies unless it is expressly shown that a different law governs, and in case of doubt, the law of the forum is preferred. (16 Am. Jur. 2d, *Conflict of Laws,* Section 5.)

All of the plaintiff class members in this lawsuit were given actual first class mail notice that this action was being brought on their behalf in the State of Kansas. The plaintiffs had the opportunity to opt out of the lawsuit and many of them did, but 28,100 of them chose to have their claims litigated in the Kansas courts. The Kansas courts have held that the plaintiff class members were adequately represented in the lawsuit and that the forum had a significant legitimate interest in adjudicating claims of class members. (*Shutts II.*)

The common fund nature of the lawsuit provides an excellent reason to apply a uniform measure of damages to the class as a whole, as each member of the class has been similarly deprived of the rightful use of his or her money. (*Shutts II.*)

In this case the law of Kansas, the forum, designating FERC interest rates, should apply. (*Gordon v. Foster,* 17 Wall. (U.S.) 123, 21 L.Ed. 589; *Shutts II* opinion, Pet. A-43.)

In *Shutts I, supra,* the Kansas Supreme Court reasoned that:

1. The oil and gas leases were involved in the case incidentally only. (222 Kan. 546.)

2. The Kansas trial court had *in personam* jurisdiction and venue of the case was wherever Phillips could be found doing business. (222 Kan. 547.)

3. Statutory interest rates of Kansas, Texas and Oklahoma were not pertinent to the case since they applied only if there was no agreed interest rate. (222 Kan. 564.)

4. Phillips, by corporate undertaking had agreed to pay interest rates established by FPC on the "suspense royalties" if ordered returned to the gas purchasers. (222 Kan. 560.)

5. Phillips put the "suspense royalties" in its corporate funds and used them to help make substantial profit. (222 Kan. 560.)

6. "Suspense royalties" eventually would go to gas purchasers or to royalty owners and never could belong to Phillips. (222 Kan. 564.)

7. Equity dictates that Phillips, having been enriched by the use of royalty owners' money, should pay royalty owners the FPC agreed rate just as they would have had to repay gas purchasers if ordered to do so. (222 Kan. 561.)

In *Shutts II,* the Kansas court further enlarged on the common fund analogy as a reason for a uniform measure of damages, and to hold Phillips liable for interest at the agreed FPC (FERC) rates. (235 Kan. 221, Pet. A-43.)

The reasoning of the Kansas court is in accord with equitable principles. It does not offend statutory or common law rules of the ten other states where Phillips produces gas. It does not contravene any U. S. constitutional principles. It does not create any federal question for which certiorari should be granted.

The ruling of the Kansas court merely requires Phillips to pay for the use of its royalty owners' money—something it should have done without court action—at least without court action a second time on this same matter.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Date: September, 1984

NO. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,

Petitioner,

V.

IRL SHUTTS, ET AL.,

Respondents.

On Petition for Certiorari to the
Supreme Court of the State of Kansas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF GRANT OF WRIT OF CERTIORARI

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NO. 84-233

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,

Petitioner,

V.

IRL SHUTTS, ET AL.,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Legal Foundation of America moves for leave to file the attached amicus curiae brief and would respectfully show the Court as follows:

1. *Identification of Amicus Curiae.* The Legal Foundation of America is a nonprofit corporation supporting the operations of a tax exempt, public interest law firm as that term is defined in IRS regulations. LFA is located on the campus of the South Texas College of Law in Houston, and it shares certain personnel and activities with the law school. Its goals include the reasonable construction of regulation and preservation of the values of federalism. In support of these goals, LFA has appeared in this honorable Supreme Court, in the federal courts of appeals, in the federal district courts, and in the courts of the several states.* .

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* In some cases, as here, LFA has appeared in its own name. In other such cases, LFA attorneys have served as counsel of record to amici interested in regulatory or federalism issues, including States, local governments, professional or trade associations, and others.

2. *Position of LFA as Amicus Curiae.* Kansas has here combined the removal of jurisdictional limitations with the forum's choice of its own law in such a way as to countermand the regulatory policies of other States. The Kansas decision raises substantial questions of both due process and interstate federalism.

3. *Desirability of an Amicus Curiae Brief.* The case is one of great public importance, and this Court is the only forum that can effectively resolve it. The academic resources available to amicus curiae because of its law school location may enable amicus curiae to contribute to understanding of the jurisdiction and choice of law issues. Further, amicus curiae is familiar with the public policy of Texas as compared with that of Kansas in the substantive area in question and may be able to assist the court in fully developing the issues.

4. *Avoidance of Duplication.* Amicus curiae has carefully reviewed the Petition for Certiorari and Appendix in an effort to avoid duplication. This brief concentrates upon issues that are not otherwise raised.

5. *Reasons for Believing That Existing Briefs May Not Present All Issues.* Though the Petition for Certiorari is clearly well drafted, the complexity of the issues makes it unlikely that any one party can brief them fully. There is need for other views to show the full impact of the decision of the Kansas Supreme Court. For example, most class actions are settled owing to the cost of such litigation, and this brief considers the effect of the decision below on such settlement. Further, the decisions of this Court emphasize the importance of jurisdictional limitations as means of ensuring "that the states . . . do not reach out beyond the limits imposed upon them by their status as coequal sovereigns in a federal system," *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1982), and this brief deals with that interstate federalism issue. The brief also covers the probability that the choice of law approach adopted below will create "magnet forums" in class actions and frustration of state policy that could result. These issues are not otherwise presented as they are presented here.

6. Consent of Parties, or Requests Therefor. The Consent of Petitioner has been requested and received. The consent of Respondents Shutts et al. has been requested and refused.

For these reasons, LFA requests that it be granted leave to file the attached amicus curiae brief.

Respectfully submitted,

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NO. 84-233

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements in paragraphs 1-3 of the Motion preceding this Brief as showing the interest of Amicus Curiae.

REASONS FOR GRANTING THE WRIT

The case at bar presents substantial questions of due process and interstate federalism. The Kansas Supreme Court correctly treated the class action in this case as a regulatory device. [1] But what the Kansas court did not acknowledge is that different jurisdictions may wish to take different approaches to both class

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1 For example, the Kansas court mentioned Kansas' interest in regulating the conduct of oil and gas producers within the territorial confines of Kansas. Appendix A28. In fact, class actions are just as effectively a type of regulatory control over the conduct of business as regulation by a consumer protection agency or oil and gas board.

actions and regulatory schemes and may attempt to diminish harmful and costly effects attributable to regulation itself.

I. THE CONFUSED JURISDICTIONAL STATUS OF MULTISTATE CLASS ACTIONS ADVERSELY AFFECTS THE INTERESTS OF CLASS PLAINTIFFS, OF DEFENDANTS, AND OF STATES IN OUR FEDERAL SYSTEM.

A. Defendants are currently unable to settle multistate class actions with assurance of binding effect, because many States refuse to give effect to class judgments in the absence of personal jurisdiction.

A defendant has the right to know whether the adjudication that will end class litigation will be binding. At present, this assurance is simply unavailable in multistate class actions.[2] There are several States whose decisions indicate that they will not give full faith and credit to class action judgments unsupported by personal jurisdiction.[3]

The defendant is particularly likely to be subjected to a "heads I win, tails you lose" approach in these circumstances. If defendant prevails in a class action in a given State, there is no assurance that nonresident class "members" will not relitigate in their home forums, and no reason to assume that their arguments that they were not subject to the jurisdiction of the foreign court will not be sympathetically received after a plaintiff class loss or low recovery.[4] These concerns are particularly important if a defendant desires to accept a settlement overture. A defendant settling a multistate class action—and it is to be remembered that a high percentage of class actions settle, because of the enormous cost and uncertainty that they impose upon both sides—does not have the ability to buy its peace.[5] This discouragement of settlement is one of the least attractive features of the decision below.

There may be even greater concern, however, for the abuses of regulation by class action than for abuses of other kinds of regulation. Any attorney, whether responsive to state policy or not, has the ability to bring a class action entailing enormous litigation costs without regulatory supervision over the decision to cause those costs. See note 19 infra.

2 Scholarly theories are diverse and inconsistent, and there is a substantial literature on the subject. See, e.g., Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 HARV. L. REV. 718 (1979); Note, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, 25 HASTINGS L.J. 1411 (1974); Comment, State Court Jurisdiction over Multistate Plaintiff Class Actions: Minimum Contacts and Miner v. Gillette, 69 IOWA L. REV. 795 (1984); Note, Toward a Policy-Based Theory of State Court Jurisdiction Over Class Actions, 56 TEXAS L. REV. 1033 (1978). Numerous other articles and notes are cited in these works.

In Illinois, some commentary has been harshly critical of Miner v. Gillette Co., 87 Ill.2d 7, 428 N.E.2d 478 (1981). See Note, Illinois Multistate Plaintiff Class Actions: Abrogation of Jurisdictional Limitations on State Sovereignty, 31 DEPAUL L. REV. 471, 496 (1982) (". . . the Miner opinion invites an onslaught of trivial suits to be filed in Illinois, suits that the state will have little reason to consider"), cf. Note, 71 ILL. B.J. 184 (1982). One article favorable to the decision was written by a member of the firm that served as plaintiff's class counsel. Ross, Multistate Consumer Class Actions in Illinois, 57 CHI-KENT L. REV. 397 (1981).

3 For example, Klemow v. Time, Inc., 466 Pa. 189, 352 A.2d 12 (1976), and Feldman v. Bates Mfg. Co., 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976), conflict with Shutts and Miner. See Petition for Certiorari at 9-11.

4 The Kansas Court did not consider the viability of multiple overlapping national class actions, in which two or more States attempt to adjudicate the same claimants' rights. See, e.g., in re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982) (involving overlapping class certifications). The decision below enhances the likelihood of such conflicts without providing guidance as to their resolution.

5 In fact, Amoco Producing Company actually made an effort here to settle possible obligations by making payments of interest in amounts it determined were lawful in each respective State. It was nevertheless subjected to a Kansas class action parallel to that against Phillips, seeking more interest. Dudley v. Amoco Production Co.,

The response of plaintiff Shutts, in this case, to these arguments has uniformly been that Phillips should "pay" and avoid the "worry." [6] There is reasonable and genuine basis for dispute, however, as to both liability and damages. Shutts' arguments have involved the unprecedented abrogation of contractual provisions and the overriding of directly applicable Texas law, and a defendant faced with the demand that it "pay" in such a situation to avoid the "worry" is in a difficult position. [7] Furthermore, Shutts overlooks the need for a principled rule of general application, governing not only this case but all cases, and functioning workably in an interstate federal system.

Finally, the rights of putative class members are at issue. These rights can be appreciated by considering a class action in which defendant prevails and judgment is rendered that claimants take nothing. Class claimants may then be in need of personal jurisdiction principles similar to those protecting defendants, [8]

No. 80-C-34 (Dist. Ct. Stevens Cy., Kan., pending). The possibility that a good faith settling defendant may be subjected to such treatment is very real, and the lack of assurance to the contrary may cause a defendant to regard as unwise a settlement offer that it would otherwise accept.

6 See, e.g., Brief of Respondents in Opposition, Phillips Petroleum Co. v. Duckworth, No. 82-461 (U.S. S.Ct. 1983), at 6 (arguing that, "If Phillips were really worried about prospective due process denials to plaintiff class, it could pay the claims and prevent the worry"). This argument misconceives the issue.

7 See note 5 supra.

8 Indeed, a class may be composed of defendants. The test for due process adopted by the Kansas court, recognizing only notice and representation as requisites of due process, would be equally applicable to a defendant class. The Kansas Court's reasoning thus supports removal of jurisdictional requirements for defendants just as it does for plaintiffs.

Nonresident class members are actually in a position analogous to that of defendants in that they may lose their rights involuntarily. See Comment, supra note 2, 69 IOWA L. REV. at 806.

because they face the cutoff of their rights by res adjudicata. [9] Shutts has argued that these concerns lack merit, but plaintiffs have themselves objected to class certification in some cases. For example, the Dalkon Shield plaintiffs [10] actually appeared in this Court in *Gillette Company v. Miner* [11] to oppose the plaintiff's argument on the ground that certification, in their case, would benefit the defendant [12] in a way unfair to the class. [13]

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9 Disposing of nonresidents' rights may be appropriate if they have intelligently and voluntarily submitted themselves to the jurisdiction of the court, for better or for worse. There are several reasons, however, that such consent cannot be inferred from the mere fact of notice in multistate class actions.

First, a court lacking power to compel appearance has no authority to compel a nonresident to opt in or opt out. See Fisch, Notice, Costs, and the Effect of Judgments in Missouri's New Common-Question Class Action, 38 MO. L. REV. 173, 212 (1973); Comment, supra note 2, 69 IOWA L. REV. at 800; Note, Personal Jurisdiction and Multistate Class Actions: The Impact of World-Wide Volkswagen v. Woodson, 32 DRAKE L. REV. 441, 459 n. 133 (1983). Absence of power to force appearance is logically inconsistent with power to force a binding choice by the filing of a paper with the court. Secondly, class notices are not comparable in effectiveness to service of process. They are notoriously poorly understood. See Miller, Problems in Giving Notice in Class Actions, 58 F.R.D. 313, 322 (1972); Comment, supra, at 800 n. 41. Third, class notices are often written so as to mislead. Finally, every class action, including the present one, necessarily involves limits on the right to opt out, and such restrictions limit the voluntariness of submission. See Comment, supra, at 800 n. 41.

10 In re Northern Dist. of Cal. "Dalkon Shield" IUD Products Liab. Litig., 693 F.2d 847 (9th Cir. 1982).

11 Brief of Amicus Curiae on behalf of Plaintiffs in the "Dalkon Shield" IUD Products Liability Litigation, Gillette Company v. Miner, No. 81-1493 (U.S. S. Ct. 1982).

12 A similar argument was made in opposition to certification by plaintiffs in In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982). Dalkon Shield and Skywalk involved mandatory class actions and thus present slightly different issues; in both cases, however, the trial court had found notice and representation sufficient

B. The assertion by Kansas of jurisdiction here is inconsistent with interstate federalism and imposes costs on other States that they might not choose for themselves.

Amicus acknowledges that, in *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee,* [14] this Court subordinated the interstate federalism aspect of personal jurisdiction to the individual liberty interests of parties. However, in *World-Wide Volkswagen Corporation v. Woodson,* [15] the Court had, shortly earlier, said the following:

> The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigation in a distant or inconvenient forum. *And it acts to ensure that the States, through the courts, do not reach out beyond the limits imposed upon them by their status as coequal sovereigns in a federal system.*

At best, the status of this interstate federalism interest in the multistate class action is confused.

An example of the conflict in State policies regarding class actions may be found in *Miner v. Gillette Company,* [16] in which this Court granted certiorari but later dismissed for lack of finality. Gillette gave away hundreds of thousands of free items in a promotional effort but underestimated demand. It offered a refund and substitute to the remainder of applicants. The class complaint charged that this ostensibly innocent conduct constituted a deceptive concealment by Gillette of the fact that it did not have sufficient merchandise to give to all who asked.

There are two ways to regard such a claim, either of which might be subscribed to by a conscientious state government. The Supreme Court of Illinois regarded the class action in question as a valuable regulatory protection for consumers. Another reasonable view, however, is that the action in *Miner v. Gillette Company* represented a kind of regulation that could raise costs for all consumers (both in Illinois and in every other State) disproportionately to its putative benefits. A State other than Illinois might conclude that the labelling of apparently innocuous conduct as deceptive[17] reduces the availability of goods and services,[18]

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to satisfy due process.

In both mandatory and voluntary class actions, defendants may be free to unfairly influence the choice of forum if multistate class jurisdiction is allowed without nexus or contacts. Such was precisely the complaint of plaintiffs in the Dalkon Shield and Skywalk cases.

13 The Kansas Court's reliance on Hansberry v. Lee, 311 U.S. 32 (1940), is misplaced for three reasons. First, the ambiguous reference to those "not within the jurisdiction" is most logically read as referring to those physically outside the state. It is less reasonable to consider this offhand remark as a major break with past jurisdictional concerns. Secondly, the phrase is dictum, because the class members in Hansberry were all residents. Third, Hansberry was decided in another constitutional era, before International Shoe v. Washington, 326 U.S. 310 (1945), and long before Shaffer v. Heitner, 433 U.S. 186 (1977) or Rush v. Savchuk, 444 U.S. 320 (1980).

14 456 U.S. 694, 702-03 n. 10 (1982).

15 444 U.S. 286, 291-92 (1980) (emphasis added). The Court concluded that the jurisdictional limit of due process was "an instrument of interstate federalism" protecting the "orderly administration of the laws" of other States. Id. at 294, quoting International Shoe v. Washington, 326 U.S. 310, 317 (1945).

16 87 Ill.2d 7, 428 N.E.2d 478 (1981).

17 A State might also conclude that the labelling of apparently honest conduct as deceptive trivializes the law and results in oppression. Cf. Comment, supra note 2, 69 IOWA L. REV. at 810.

18 Cf. R. POSNER, ECONOMIC ANALYSIS OF LAW ch. 6 (2d ed. 1977).

because producers must protect themselves from unpredictable liability. The ease of blackmail,[19] disproportionate enrichment of class counsel, and inevitable frustration of state policy that results from even conscientious efforts to adjudicate fifty sets of complex state laws,[19a] might be further concerns to such a State. Particularly when, as in *Gillette*, there was no monetary loss to any consumer, and potential recoveries were only a few dollars, a thoughtful state citizenry might choose to avoid encouraging multistate class actions such as those certified by Kansas and Illinois, as a means of protecting itself from the costs and disadvantages of such actions.

Indeed, it is arguable that the majority of States have already made this choice by declining to adopt proposed legislation that would sanction multistate class actions on a reciprocal basis. The Uniform Class Actions Act [20] provides two means by which a

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19 Id. at 474. A class action "places the lawyer in [a position that] relieves him of accountability, which is bad, because his private goal diverges from the social goal of obtaining a judgment equal to the social costs of the violation." Id. at 450.

19a It is unlikely, for example, that a local state court will have ready access to statutory and decisional law of all fifty states. It is equally unlikely that all counsel will. The removal of decisional law from its procedural context and the complexity of the kinds of consumer and energy laws at issue make appropriate understanding of all fifty jurisdictions' laws unlikely, not to mention the possibility of the forum's disregard of those laws, as in the present case. See Note, 92 HARVARD L. REV., supra note 2, at 734; Comment, 69 IOWA L. REV., supra note 2, at 804 (concluding that "the usual risks involved in interpreting unfamiliar laws increase exponentially in a nationwide class action").

20 UNIFORM CLASS ACTIONS ACT sec. 6 provides:

(a) A court of this State may exercise jurisdiction over any person who is a member of the class suing or being sued if:

(1) a basis for jurisdiction exists or would exist in a suit against the person under the law of this State [or]

(2) the state of residence of the class member, by class action law similar to subsection (b), has made its residents subject to the jurisdiction of the courts of this State.

court can obtain jurisdiction over a class of multistate plaintiffs: (1) by the presence of minimum contacts or (2) by a reciprocal recognition of the binding effect (i.e., by a State's consenting to have its citizens bound by class actions elsewhere). The Uniform Act respects interstate federalism concerns, and it is notable that it would require minimum contacts here. Texas, Oklahoma, and the majority of States have declined to adopt the reciprocal provisions of the Act.[21] Even upon full consideration, they might decide not[22] to adopt them, if they concluded that their citizens' interests would be better served by a narrower class action approach entailing lower regulatory costs and fewer disadvantages. Kansas and Illinois have countermanded this choice.

II. KANSAS' SUBSTITUTION OF ITS OWN LAW FOR THAT OF OTHER STATES WILL LEAD TO "MAGNET" FORUMS FOR CLASS ACTIONS AND TO FRUSTRATION OF THE POLICIES ADOPTED BY OTHER STATES.

The Kansas court avoided some of the conflict of laws questions faced in *Miner v. Gillette Company* by the expedient of countermanding the Constitutions, legislation, and court decisions of Texas and Oklahoma. Kansas made clear that it will apply its own law in derogation of that of a different State even if the interests of the other State are more significant and even if the transaction took place in the other State between citizens

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(b) A resident of this State who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if by similar class action law it extends reciprocal jurisdiction to this State.

21 Only North Dakota has adopted the reciprocal feature of the Uniform Act. See N.D. R. CIV. P. 23(f).

22 Cf. Scher, Uniform Class Actions: A Critical View, 63 A.B.A.J. 840 (1977). Oklahoma has continued to require opt-in and has thus expressed its preference to confine class litigation more narrowly. Okla. Stat. Ann. Tit. 12, sec. 14.

of the other State. [23]

As the Kansas court appeared to recognize,[24] this holding creates the danger that resort to "magnet" forums may defeat the chosen substantive policy of other States. If other States were to adopt a similar approach, plaintiffs' attorney would be able in every class action to identify a "best" plaintiffs' forum. This magnet jurisdiction would be the State that would be most likely, among the fifty States of the union, to hold against the defendant, or the one that would award maximum damages.[25] Such a forum would ignore laws that would produce a defendant's judgment or a lower recovery. The frustration of the substantive regulatory choices made in the respective regulatory commissions, legislatures, or courts of other States would naturally follow. The effect would be similar to, but more direct, than that condemned by this Court in the famous case of *Erie RR. v. Tompkins.*[26]

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23 Only if it is convinced that reasons to the contrary are "compelling" would Kansas do otherwise. Appendix A43.

24 "[T]his opinion should not be read as an invitation to file nationwide class action suits in Kansas and overburden our court system." Appendix A24.

25 Ironically, the Kansas court applied Kansas law in part because "[t]he plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." Appendix A43. In this, the court missed the point.

It was no accident that the action was filed in a forum in which the forum's law was adverse to the defendant to the maximum degree. Under these circumstances, it is not surprising that plaintiffs "desired" that law to apply. The question remained whether such application was consistent with the defendant's rights, a question the Kansas Court did not deem necessary to consider. Id. at A42-A43.

26 304 U.S. 64 (1938). The Erie Court emphasized the frustration of state policy resulting from substitution of law preferred by the forum, and it cited Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1932) to that effect. Precisely the same kind of frustration, as well as the same

In the present case, for example, Texas has strong interests in the relationship between oil and gas producers and royalty owners. This Legal Foundation has appeared in natural gas cases arising from both Texas and Kansas and would respectfully state to the Court that the jurisprudence of the two States differs dramatically. Kansas, in fact, is a maverick jurisdiction in oil and gas matters,[27] probably because a portion of the State produces oil and gas but a larger and politically more powerful segment does not. Kansas' attitude toward producers has resulted in Kansas Supreme Court decisions that have been attacked by the Federal Energy Regulatory Commission in this Court on federalism grounds.[28]

Interest on suspense royalties is a case in point. The ability to suspend royalty is absolutely essential, since loss of the lease may follow even inadvertent underpayment and since lawful rates are frequently uncertain. The producer is often in the situation in which gas purchasers claim that he is overcharging and royalty owners claim that he is underpaying, and suspension of payment pending determination is the only way to assure against multiple liability. Respondent Shutts, reflecting the Kansas attitude, describes suspension as "wrongful."[29] But to the State of Texas, which protects the right to suspend and would require a non-punitive approach to interest, the Kansas approach seems

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kind of forum shopping and discrimination as were concerns in Erie, would result from the Kansas Court's decision here.

27 For example, Kansas is one of very few jurisdictions that have enacted intrastate price controls lower than those that would be administered by the Federal Energy Regulatory Commission. See Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400 (1983). Kansas has interpreted its law together with federal law so as to abrogate agreed pricing terms on gas sold in Kansas. Compare Mesa Petroleum Co. v. Kansas Power & Light Co., 229 Kan. 631, 629 P.2d 190, on rehearing, 230 Kan. 166, 630 P.2d 1129 (1981) with Pennzoil v. FERC, 645 F.2d 360 (5th Cir. 1981) (affirming contrary conclusion by FERC). Other examples are to be found in the Petition for Certiorari.

28 Brief of Federal Energy Regulatory Commission, Mesa Petroleum Co. v. Kansas Power & Light Co., No. 81-711 (U.S.S.Ct. 1981).

calculated to discourage production. Furthermore, agreement on interest treatment of suspense royalties is a common and appropriate feature of oil and gas leases, but the Kansas court here nullified such agreements, even if made in Texas by Texas citizens. The Kansas approach amounts to imposition of higher energy costs on each of the other States, favors narrow interests of Kansas citizens, and might be opposed by Texas and Oklahoma as not leading to the best climate for oil and gas production in the long term.

The point is not whether Kansas or Texas law is "better" policy. It is that this frustration of other States' policy is an inevitable feature of Kansas' choice of law approach. Furthermore, if the Kansas approach were generally adopted throughout the nation, it would create a magnet forum for every class action.

III. THE KANSAS COURT'S "COMMON FUND" REASONING PARTICULARLY CALLS FOR THIS COURT'S REVIEW.

The Kansas court's effort to support its decision by "common fund" reasoning[30] particularly calls for this Court's review. This action for damages[31] does not in any respect resemble the common fund cases,[32] and indeed the difficulty with the Kansas

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29 Brief of Respondents in Opposition, Phillips Petroleum Co. v. Duckworth, 103 S.Ct. 725 (1983) (Shutts II), at 14, citing Shutts v. Phillips Petroleum Co., 222 Kan. 527, 552-53, 567 P.2d 1292 (1977) (Shutts I) (calling the possession of moneys by suspension "wrongful").

30 The Kansas court used this reasoning to support both its jurisdictional conclusions and its choice of Kansas law. Appendix A12, A43.

31 The Kansas court expressly held that the action "is one for damages." Appendix A44. This conclusion would contradict the "common fund" conclusion even if there were no other reasons against it. See note 32 infra.

32 This Court's common fund cases are based on the rationale that if there is an identifiable, exhaustible res, which might be made the

court's reasoning is that it is equally applicable to every class action.[33] It would authorize a magnet forum to ignore jurisdictional and choice of law concerns in virtually every such case.

CONCLUSION

Both the class action jurisdiction question and the choice of law approach adopted by Kansas present substantial questions that should be decided by this Court.

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subject of inconsistent adjudications, it is appropriate to adjudicate all claims affecting the res in one proceeding, where the res is located. A common fund is like a single fixed pie against which there are claims by persons so related that, if their claims were differently adjudicated, the results would be inconsistent. For example, in Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915), the Court concluded that an insurer's safety fund, made of contributions, was necessarily treated as a unit because "[t]he fund was single . . . . It would have been destructive of [policyholder's] mutual rights to use the mortuary fund in one way . . . in one state, and to use it in another way . . . in another state." Id. at 670-71.

No such situation exists here. There would be no inconsistency if some claimants received one amount and others received whatever other amount, if any, might be due them; in particular, there would be no inconsistency if Texas claimants' claims were adjudicated in Texas under Texas law. There is, further, no reason for supposing that their claims must be paid from a "fund" located in Kansas. Petitioner Phillips' characterization of this reasoning as judicial "alchemy" is justified.

33 The Kansas court's reasoning was based in large part upon the fact that the claims are similar. But common issues are a requisite of every class action. The court buttressed its conclusion by the argument that defendant did not segregate damages in advance in its accounting and that the defendant did business in the State. These conditions too may be expected in virtually every multistate class action.

Respectfully submitted,

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No. 84-233

IN THE

Supreme Court of the United States

October Term 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

IRL SHUTTS, *et al.*,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

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IN THE

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PHILLIPS PETROLEUM COMPANY,

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Respondent.

MOTION OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

Pursuant to Supreme Court Rule 36.1, the National Association of Independent Insurers (the "NAII") moves for leave to file the accompanying brief in support of the petition for a writ of certiorari filed herein by petitioner Phillips Petroleum Company.

The NAII is the largest insurance trade association in the United States. It is composed of over 500 insurance companies writing policies of property and casualty insurance in all fifty states. By permitting maintenance of nationwide class actions in the courts of Kansas despite the absent class members' conceded lack of any contacts with Kansas, and by applying

Kansas law to adjudicate the claims of all class members, including non-residents of that state, the decision below poses a substantial threat to the interests of the members of the NAII. Because they serve millions of consumers located in every state, members of the NAII are especially likely to become involved in such nationwide class actions. Those class actions would present unique problems to the insurance industry, particularly if they were to be determined solely pursuant to the law of the forum state, since insurers are subject to varying forms of extensive regulation by each of the fifty states.

Accordingly, the NAII believes that it will present arguments to this Court that will not be presented in the same form by the parties.

The NAII, the Alliance of American Insurers and the American Insurance Association were granted leave to file an amicus brief in the case of *Gillette Co. v. Miner,* 456 U.S. 914 (1982), which also questioned the propriety of nationwide class actions.

The NAII has sought the consent of counsel for petitioners, Joseph W. Kennedy, and counsel for respondent, W. Luke Chapin, for leave to file the accompanying brief. Counsel for respondent denied this request.

For the foregoing reasons, the National Association of Independent Insurers prays that this Court grant its motion for leave to file the accompanying brief in support of the petition for a writ of certiorari to the Supreme Court of Illinois in the case of *Phillips Petroleum Co. v. Shutts.*

Respectfully submitted,

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September 10, 1984

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BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

This Brief, in support of the Petition for a Writ of Certiorari is submitted in accordance with Rule 36.3 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

Amicus, the National Association of Independent Insurers ("NAII"), is a trade association composed of over 500 property and casualty insurance companies of all types—stock, mutual, reciprocal and Lloyd's Plans. 156 of its members are licensed to do business in Kansas, representing $295,586,275 in premium volume in that state alone.

The interest of the NAII as *amicus* arises out of the impact which the decision below may have on (1) class action litigation in which members of the association become involved and (2) the orderly regulation of the business of insurance in the United States.

In the McCarran-Ferguson Insurance Regulation Act of 1945, Congress declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest. . . ." 15 U.S.C. § 1011 (1976). In response to that Act, and in order to preserve their primacy in the field of insurance regulation, the states have adopted separate statutes and administrative regulations comprehensively regulating the business of insurance, including such matters as property and casualty insurance rates, cancellation and non-renewal of automobile and homeowners insurance policies, insurance

holding companies and unfair and deceptive trade practices.[1] As a result, this Court has recognized that "[w]hen the States speak in the field of 'insurance,' they speak with the authority of a long tradition." *S.E.C. v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, 68-69 (1959).

The insurance practices which are separately regulated by the state insurance codes and administrative regulations have in recent years been the subjects of numerous consumer class actions in state courts.[2] When a class is limited to policyholders who are residents of one state, the insurance laws and regulations of the forum are applied to resident policyholders who are plainly subject to the court's *in personam* jurisdiction. In a nationwide class action, however, the rights of California policyholders, under statutes and regulations administered by the California Department of Insurance, might be determined by a Kansas court which lacks *in personam* jurisdiction over both the California policyholders and the Department. Indeed, under the ruling below, an even more impermissible result

[1] A catalog of the rate regulation, deceptive trade practices, and holding company statutes of the fifty states is contained in a publication of the Illinois Department of Insurance, *Insurance Regulation and Antitrust: The Effect of the Repeal of the McCarran-Ferguson Act* 24 nn.22, 24, 26 (1979). The statutes governing the cancellation and nonrenewal of automobile insurance are described in the American Insurance Association's *Summary of Selected State Laws and Regulations Relating to Automobile Insurance* 20-40 (1979).

[2] *See, e.g., Steward v. Allstate Ins. Co.*, 92 Ill. App. 3d 637, 415 N.E.2d 1206 (1st Dist. 1980) (cancellation and non-renewal); *Spirek v. State Farm Mutual Automobile Ins. Co.*, 65 Ill. App. 3d 440, 382 N.E.2d 111 (1st Dist. 1978) (subrogation rights under automobile insurance policies); *Nye v. Erie Ins. Exch.*, 470 A.2d 98 (Pa. 1983) (right to no-fault insurance benefits for income lost by deceased accident victims); *Thomas v. Liberty Nat. Life Ins. Co.*, 368 So.2d 254 (Ala. 1979) (interest on benefit payments); *Civil Service Employees Ins. Co. v. Superior Court*, 22 Cal. 3d 362, 584 P. 2d 497, 149 Cal. Rptr. 360 (1978) (benefits under "medical expense" clause in policy).

might obtain were a nationwide class action involving insurance matters to be filed in Kansas. Since the Kansas Supreme Court held that it was proper to resolve the claims of all non-Kansas owners of Phillips Petroleum Company royalties under Kansas law, it might similarly apply Kansas insurance laws to adjudicate the claims of California policyholders.

The prospect of having the courts of one state intrude on the independent regulation of the insurance business in the other forty-nine states, in matters involving thousands or millions of policyholders having no contacts with the forum, threatens to disrupt the Congressionally recognized right of each state to regulate that business within its jurisdiction as it sees fit. Accordingly, the NAII submits that the decision below is one of substantial significance warranting this Court's review.

SUMMARY OF ARGUMENT

A state court may not exercise jurisdiction over absent class plaintiffs who have no contacts with the forum. The "minimum contacts" test of personal jurisdiction developed by this Court must be applied to all parties who have not consented by affirmative act to a state court's jurisdiction.

The importance of this question is demonstrated by this Court's grant of certiorari in *Gillette Co.* v. *Miner*, 456 U.S. 914 (1982), presenting an almost identical issue. Moreover, the courts of some states have already held that judgments purporting to bind absent class members beyond the class action court's jurisdiction violate due process and will not be accorded full faith and credit in those states. Only this Court can resolve the dispute among state courts on this issue.

The decision below permits not only the assertion of jurisdiction over non-resident plaintiffs with *no* contacts with the forum, but also the application of Kansas law to the claims of absent class members having *no* contact with Kansas. Such a holding, if applied to insurance cases, could result in extensive interference with the present system of insurance regulation.

REASONS FOR GRANTING THE WRIT

BY PERMITTING KANSAS COURTS TO EXERCISE JURISDICTION OVER ABSENT CLASS MEMBERS WHO HAVE NO CONTACTS WITH KANSAS, THE DECISION BELOW CONTRAVENES EVERY DECISION OF THIS COURT SINCE *INTERNATIONAL SHOE* ON PERSONAL JURISDICTION.

THE DECISION OF THE SUPREME COURT OF KANSAS THREATENS TO DISRUPT THE REGULATION OF THE BUSINESS OF INSURANCE BY SUBJECTING INSURERS TO NATIONWIDE CLASS ACTION LITIGATION IN THE COURTS OF ONE STATE ON ISSUES PROPERLY DETERMINED BY THE LAWS, INSURANCE DEPARTMENTS, AND COURTS OF EACH STATE IN WHICH THE DISPUTED TRANSACTIONS OCCURRED.[3]

It is axiomatic that a state court may not exercise jurisdiction in any case in which the parties and the subject matter of the litigation lack "minimum contacts" with the forum. *See, e.g., International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

The Kansas Supreme Court, however, held that the "minimum contacts" test applies only to non-resident defendants and does not apply at all to absent class plaintiffs. Petitioner's Appendix at A-12 to A-13. Notice and an opportunity to be heard were sufficient, in the Kansas court's view, to empower Kansas to assert personal jurisdiction over non-consenting, non-resident class members having *no* contacts whatsoever with Kansas. *Id.* at A-12.

These rulings plainly violate this Court's decisions which hold that state court jurisdiction is constrained by the "minimum contacts" test. For the reasons discussed *supra,* this constraint applies with particular force in cases involving insurance regulation, to which the NAII's member companies are frequently parties.

[3] In addition to the grounds cited herein, the NAII adopts the reasons for granting the writ advanced by Philips Petroleum Company in its Petition for a Writ of Certiorari.

A. A State Court May Not Assert Jurisdiction Over Non-Consenting Litigants Having No Contact With The Forum.

Contrary to the holding of the Kansas Supreme Court, even when it is not unfair to a litigant to require his appearance in a particular forum, absence of "minimum contacts" precludes the exercise of jurisdiction. In *Rush v. Savchuk,* 444 U.S. 320 (1980), this Court held that state court jurisdiction over an insured defendant may not be based solely upon the presence within the state of an insurance company that has undertaken a contractual obligation to defend and indemnify him in connection with the suit. *Id.* at 328-33. This Court accordingly reversed a holding that in those circumstances, jurisdiction could be asserted whether or not the named defendant had "minimum contacts" with the jurisdiction because the burden of the case fell on the insurer:

> The State's ability to exert its power over the "nominal defendant" is analytically prerequisite to the insurer's entry into the case as a garnishee. If the Constitution forbids the assertion of jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing the "garnishee" into the action. Because the party with forum contacts can only be reached through the out-of-state party, the question of jurisdiction over the nonresident cannot be ignored.

Id. at 330-31 (footnote omitted).

The Court expressly found it unnecessary to refer to "traditional notions of fair play and substantial justice" in a case in which "the defendant has *no* contacts with the forum." *Id.* at 332. Where, as in *Rush,* there are *no* contacts, assertion of jurisdiction is constitutionally barred because the Due Pro-

cess Clause "does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington,* 326 U.S. 310, 319 (1945).

The Kansas Supreme Court felt that it could ignore the constitutionally mandated "minimum contacts" test simply because the absent parties were plaintiffs rather than defendants. Petitioner's Appendix, A-12.

To the contrary, however, the requirements of the Due Process Clause cannot be affected by the alignment of parties as plaintiffs or defendants.[4] Mere notice and an opportunity to be heard is constitutionally insufficient to justify a state court's assertion of jurisdiction over a non-resident defendant. A non-resident plaintiff class-member similarly cannot be compelled to take affirmative action to avoid a Kansas court's assertion of jurisdiction over his person based merely on notice and an opportunity to be heard.[5] "[*A*]*ll* assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer v. Heitner,* 433 U.S. 186, 212 (1977) (emphasis added).

The decision below is thus directly at odds with all of this Court's prior decisions forbidding exercise of personal jurisdic-

[4] *See Vanderbilt v. Vanderbilt,* 354 U.S. 416, 418-19 (1957) (alimony rights of absentee respondent in divorce proceeding); *New York Life Ins. Co. v. Dunlevy,* 241 U.S. 518 (1916) (right of adverse claimant in interpleader action). *See generally* Note, *Multistate Plaintiff Class Actions,* 92 Harv. L. Rev. 718, 726 nn.70-73 (1979).

[5] On the other hand, there is nothing constitutionally impermissible in a state court's assertion of jurisdiction over a non-resident plaintiff's voluntarily filed claim against a non-resident defendant if the plaintiff suffered damage in the state and the cause of action arises out of the activity being conducted by the defendant in the state. *Keeton v. Hustler Magazine, Inc.,* 104 S. Ct. (1984).

tion over a non-resident who has *no* contacts with the forum.[6] Moreover, at least two states have already ruled that nationwide class actions are improper on the ground that a state court could not exercise jurisdiction over claims of nonresidents lacking minimum contracts with the forum.[7] In such states, the validity of a judgment against a nationwide class obtained by insurers who successfully defend Kansas action would not be accorded full faith and credit. Only a determination now by this Court as to the propriety of nationwide class actions in state courts can avoid the chaos which will be caused by the inconsistent judgments of various jurisdictions on this issue.

B. Permitting a Forum State To Apply Its Own Law to Absent Class Members' Claims Having No Connection With The Forum Would Unconstitutionally Interfere With The Interests of Other States, Insurers And Consumers In The Consistent Application Of State Statutes And Regulations Governing Insurance.

"[T]he Due Process Clause ensures not only fairness, but also the 'orderly administration of the laws'. . . ." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 280, 294 (1980)

[6] The Kansas Supreme Court also rejected the argument that the assertion of jurisdiction over absent class members was inconsistent with the status of a state court as an instrumentality of a "coequal sovereign in a federal system." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980). While this Court has recently suggested, contrary to its previous decisions, that notions of federalism do not operate as an "independent restriction" on a state court's assertion of personal jurisdiction (*Insurance Corporation of Ireland v. Compagnie Des Bauxites,* 465 U.S. 694, 703 n.10 (1982)), the Court has never held that the "minimum contacts" requirement could be ignored. Rather, it has simply shifted the focus to the non-resident party's right not to be subjected involuntarily to the authority of the courts of a jurisdiction with which that party lacks the "minimum contacts" necessary to confer *in personam* jurisdiction.

[7] *Feldman v. Bates Mfg. Co.,* 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976); *Klemow v. Time, Inc.,* 466 Pa. 189, 352 A.2d 12, *cert. denied,* 429 U.S. 828 (1976).

(quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 319 (1945)). The court below sought to avoid the many problems caused by administering the laws of many states in one proceeding by arbitrarily choosing to apply the law of Kansas to all class members' claims.

"'[T]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'" *National League of Cities v. Usery,* 426 U.S. 833, 844 (1976) (quoting *Texas v. White,* 7 Wall. 700, 725 (1869)). One state should not be permitted to violate the sovereignty of the other states by adjudicating a controversy concerning the citizens of the other states under the laws of forum when the forum state itself has little or no interest in the litigation. In the present case, there is no reason to apply Kansas law to claims by unnamed out-of-state plaintiffs except that Kansas attorneys happened to file an action in Kansas before any were filed elsewhere. Indeed, the Kansas Supreme Court did not even purport to identify any Kansas interest that would justify application of Kansas law to the claims of absent class members. However, it is clear that "if a State has only insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Insurance Company v. Hague,* 449 U.S. 302, 311 (1981).

In the insurance context, it is evident that class actions challenging the propriety of policy provisions or other practices could never be constitutionally decided under the forum state's law where absent class members and the acts or transactions in suit had *no* contact with the forum state. The insurance statutes and regulations of the fifty states are both complicated and diverse. Not only has each state adopted its own statutes and promulgated its own regulation but each has developed its own common law. Moreover, in every state, the power to enforce the insurance laws is vested in an Insurance Department or similar body with expertise in that state's law. Thus, even when two states have adopted substantively similar statutes, the

statutes may be interpreted and applied differently by the regulators and the courts of those two states. Consequently, an insurance policy provision or practice approved for use in California by its insurance department might violate the insurance laws of Kansas. But it would be patently absurd—and unconstitutional under the holding of *Hague*—to apply Kansas law to an absent California policyholder's claim in a nationwide class action simply because suit was filed there.

Since the passage of the McCarran-Ferguson Insurance Regulation Act of 1945, 15 U.S.C. 1011-1015 (1976), it has been acknowledged that the public policy of the United States has been to leave insurance regulation to the individual states. *See Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 429-30 (1945). Recognizing the special interest of the states in issues of insurance regulation, federal courts often decline to exercise their jurisdiction in such cases to avoid interference with the orderly application of state law. *E.g., Levy v. Lewis,* 635 F.2d 960, 963-64 (2nd Cir. 1980); *Smith v. Metropolitan Property & Liability Insurance Co.,* 629 F.2d 757, 760-61 (2nd Cir. 1980); *Allstate Insurance Company v. Sabbagh,* 603 F.2d 228, 233-34 (1st Cir. 1979). Allowing Kansas courts to apply Kansas law in nationwide class actions involving the insurance laws of other states would be totally inconsistent with this Congressionally mandated and judicially enforced scheme of state insurance regulation, and would also be unfairly detrimental to defendants' and absent class members' interests in the orderly application of the law.

Inevitably, then, a state court would be required to analyze and apply each state's insurance codes and regulations to the claims of fifty separate subclasses of plaintiffs. The mammoth complexity of managing of a class action comprised of thousands of plaintiffs divided into fifty sub-classes requiring the application of fifty states' laws has a constitutional dimension as well. It puts such a burden of time and expense on the court

and defendant that due process and a right to a fair trial itself may be lost in the fray.[8]

Parties may always be at some disadvantage when a court attempts to apply unfamiliar foreign law. See *Allstate Insurance Company v. Hague*, 449 U.S. 302, 326 & n.14 (1981) (opinion of Stevens, J., concurring in judgment). However, the possibility of error and confusion is obviously magnified when a court attempts to apply the laws of all fifty states at once. *See, e.g., Spirek v. State Farm Mutual Automobile Insurance Co.*, 65 Ill. App. 3d 440, 453-54, 382 N.E.2d 111, 120-121 (1st Dist. 1978). Such an attempt, no matter how heroic, is inconsistent with the due process interest in the orderly application of laws recognized in *World-Wide Volkswagen*.

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[8] That problems of "manageability" could constitute a denial of defendant-insurer's right to a fair trial is apparent from considering hypothetical nationwide class action alleging breach of an insurance contract. In such a case, a state court would be required to adjudicate every state's statute of limitation, common law regarding breaches of contract, waiver, estoppel, etc., as well as unfamiliar and complex statutes and regulations governing insurance contracts. Moreover, the procedural provisions of each state's insurance statutes and regulations would have to be interpreted in order for the court to rule on such defenses as primary jurisdiction and failure to exhaust administrative remedies. This process would be further complicated by the changes in each state's insurance laws and regulations which might have taken place during the relevant period.

CONCLUSION

For the reasons set forth herein, *amici* respectfully submit that the decision below is of substantial significance warranting this Court's review, and that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 10, 1984

No. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

---

REPLY OF PHILLIPS PETROLEUM COMPANY

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

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REPLY OF PHILLIPS PETROLEUM COMPANY[1]

I. STATE COURT JURISDICTION

Respondents challenge Phillips' standing to litigate the existence of jurisdiction over nonresident unnamed plaintiff class members, arguing that only class representatives have the right to object to the propriety of jurisdiction over class members. Contrary to the respondents' assertion, it is clear that Phillips has the right to challenge the Kansas court's jurisdiction over those class members who have no contacts with Kansas. In *Hanson v. Denckla*, 357 U.S. 235, 245 (1958), the

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[1] Phillips' statement pursuant to Sup. Ct. R. 28.1 can be found at A68 of the Appendix to Phillips' Petition for a Writ of Certiorari.

Court held that when "any defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired", quoting, *Chicago v. Atchison T. & S.F.R. Co.*, 357 U.S. 77 (1958). Phillips has been held liable to over 27,500 class members who have no affiliation with Kansas and whose claims are unrelated to Kansas. Phillips clearly has a "direct and substantial" interest in determining whether Kansas can constitutionally render a binding judgment under these circumstances. The impact on Phillips of this judgment is neither speculative nor merely a fear of harm that may occur in the future.

Counsel for respondents have consistently assumed that giving notice to class members is the equivalent of having the power to bind these class members. They assert that mere notice is sufficient not only to allow counsel to represent all class members but also to decide on their behalf whether to submit to jurisdiction in Kansas. This result, however, follows only if the constitutional issue presented in this case is resolved in respondents' favor. Only if this Court decides that notice and representation equals jurisdictional power can the respondents' counsel speak for the 28,100 absent class members. The petitioner has pointed out in its earlier brief, (1) this issue has never been decided by this Court, (2) respondents' position is inconsistent with this Court's precedents, such as *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286 (1980), and (3) the lack of any certainty on this subject has caused considerable confusion and inconsistencies of treatment throughout the nation, as evidenced by the division of authority among the states.

Moreover, respondents have misstated the position of Phillips. Phillips does not contend that a state court is without power to bind nonresidents in all circumstances. No constitutional problems arise when a plaintiff voluntarily brings an action in a foreign court and when the

harm for which recovery is sought occurred at least in part in that state. See, *Keeton v. Hustler Magazine, Inc.*, —— U.S. ——, 104 S. Ct. 1473 (1984).

The decisions of this Court also show that nonresident class members, like nonresident defendants, can be bound when there are sufficient affiliating circumstances between them and the forum so that it is fundamentally fair for that court to assent jurisdiction over them. Thus, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which respondents erroneously rely on for a much broader proposition, a state court could exercise jurisdiction to determine claims of nonresident "class" members to a fund established, administered and maintained in that state by a citizen of that state. In the present case, however, no circumstances exist that relate the claims of nonresidents to Kansas. The claims of these class members did not arise in Kansas and are completely unrelated to Kansas. No fund is maintained in Kansas of which ownership needs to be determined.[2] Nor did the unnamed nonresident plaintiffs voluntarily come to Kansas to institute this action. It is this lack of relationship between the nonresidents, their claims, and the forum that gives rise to the constitutional problems presented in this case.

The importance and frequency of the jurisdiction question presented by this case continues to grow. Respondents' brief itself identifies five occasions on which this

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[2] Respondents attempt to concoct a "fund" based upon language in *Shutts I*. In that case, a "fund" was fashioned of proceeds Phillips collected from pipeline purchasers. A ficticious aggregation of a portion of these sums collected under FPC suspension procedures that would either be paid to royalty owners or returned to the pipelines at the conclusion of FPC proceedings constituted a "fund." In *Shutts II*, however, Phillips was liable for interest on royalties paid for gas not even sold to pipelines. It is thus impossible to fabricate from these claims the "fund" found in *Shutts I*. Even if it was possible to fabricate a "fund" it would be impossible to establish Kansas as the situs of that "fund."

jurisdictional issue has been presented for review by this Court in the single context of Kansas state actions for interest on royalties.[3] It has arisen and is bound to arise in numerous contexts. For example, in the consumer field, this Court accepted for review *Minor v. Gillette Company*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*, 459 U.S. 86 (1982), but was unable to reach the merits.

Liberal state procedures governing class actions may lead increasingly to the filing of state class actions in many different contexts. In Kansas, for example, judicial interpretation of the class action statute has rendered it more favorable to class actions than the Federal Rule. See, *Comment, The Kansas Class Action Device*, 31 Kan. L. Rev. 305 (1983). Since federal jurisdictional standards have "caused litigants similarly situated to turn more frequently to state forums to redress their common grievances . . .", *Newburg On Class Actions* § 1206 (1980 Supp.), the problems that arise from the unresolved constitutional questions presented by this case in all likelihood will escalate. Resolution is needed now; certiorari should be granted to bring some predictability to the area of multistate class actions.

II. APPLICATION OF KANSAS LAW

It is equally important to grant certiorari in this case to reverse the application of Kansas law to all class members by the court below. The Kansas court fashioned a national remedy based upon its own concept of "equity" and imposed it upon thousands of people from every

[3] See *Shutts I*, 222 Kan. 527, 567 P.2d 1292, *cert. denied*, 434 U.S. 1068; *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326, *cert. denied*, 434 U.S. 1065; *Sterling v. Superior Oil Company*, 222 Kan. 737, 567 P.2d 1325, *cert. denied*, 434 U.S. 1067; *Nix v. Northern Natural Gas Co.*, 222 Kan. 739, 567 P.2d 1322, *cert. denied*, 434 U.S. 1067; *Phillips v. Duckworth*, —— U.S. ——, 103 S. Ct. 725 (1983).

other state and the entire oil industry. The respondents justify this on the ground that the Kansas court's notions of equity have necessarily led to a just result that this Court should not upset. The conclusion Kansas reached, however, may not be "equitable" when viewed through the eyes of one of the states with a greater interest in those leases that may have a very different vision of what is "equitable" public policy.[4]

The courts in Texas have indicated that the proper result in these cases is contrary to the result reached in Kansas. Disregarding defenses on the merits, where Texas courts award interest they have limited interest to a rate determined by the Texas legislature. See, *Phillips Petroleum Company v. Stahl Petroleum Company*, 569 S.W.2d 480 (Tex. 1978). Petitioner believes it is imperative for this Court to consider the important constitutional questions in this case and declare that a state court in a nationwide class action is not free to apply and export its notions of public policy, or "equity," to transactions and people having absolutely no affiliation with the forum whatsoever.

The uncertainty created when the Kansas court arrogates to itself the power of regulating the relationship between natural gas companies and their royalty owners throughout the United States discourages compliance with contractual obligations and breeds conflict among the states.[5] If the Kansas court can assert jurisdiction

[4] Although the oil and gas industry is "significant" in Kansas, respondents have failed to show how that justifies litigating this lawsuit or how Kansas' regulation of the oil and gas industry is more desirable than regulation by Texas, Oklahoma, Louisiana, New Mexico or Wyoming, each of which has a greater interest in the transactions underlying this lawsuit and in each of which the oil industry is also "significant."

[5] As can be seen from the amicus curiae brief filed by Amoco Production Company, payment of interest to nonresident class members pursuant to other states' laws did not prevent a suit for additional interest based on Kansas law.

and apply its own law in this case, then a Texas court could take jurisdiction over another national class of royalty owners—perhaps parties to different leases or even over the same royalty owners on claims arising after other FPC opinions—decide the same substantive issue in a diametrically opposite fashion, and that result would have to be honored everywhere else, including Kansas. The result would be total instability; everyone's rights—Phillips', the other oil or gas companies', and the royalty owners'—would be completely dependent upon who brought a class action where, first. This instability, which will not be limited to the oil and gas industry, or even to the world of commerce, can be reduced only by this Court enunciating some limitation under the full faith and credit clause on the application of forum law in state court class actions. Only if Phillips and all other national companies doing business in Kansas can have assurance as to what law will be applied to transactions on which a Kansas class action could be based will the gamble of doing business in that state be reduced.

CONCLUSION

The Petition for a Writ of Certiorari should be granted. The time has come to reduce the uncertainty engendered by these vitally important constitutional questions of state court jurisdiction and choice of law.

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No. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Kansas

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 8, 1984
CERTIORARI GRANTED OCTOBER 9, 1984

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April 12, 1982—Defendant's Brief on Jurisdiction Over Claims of Non-Resident with Affidavit No. 4 of C. J. Roberts attached filed

June 3, 1982—Journal Entry on Class Certification and Notice filed

June 21, 1982—Affidavit of Mailing of Notice of Class Action Suit filed

September 15, 1982—Affidavit of Mailing of Notice of Class Action Suit filed

December 7, 1982—Pretrial Order filed

May 20, 1983—Journal Entry of Judgment filed

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June 15, 1983—Docketing Statement, Civil, Cross-Appeal filed

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August 9, 1983—Brief of Appellant filed

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November 11, 1983—Amicus Brief of Sun Oil filed

March 24, 1984—Opinion of Kansas Supreme Court filed

April 13, 1984—Motion for Rehearing filed

April 19, 1984—Response to Motion for Rehearing filed

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June 18, 1982—Motion to Dismiss Motion for Order of Mandamus filed

June 28, 1982—Order denying Petition for Order of Mandamus filed

IN THE DISTRICT COURT
OF SEWARD COUNTY, KANSAS

No. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,

Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,

Defendant.

(Civil Class Action under K.S.A. Chapter 60)

PETITION

COME NOW the plaintiffs and allege and show to the court:

1) Plaintiff Irl Shutts is a resident of Barber County, Kansas, and his post office address is Sun City, Kansas. Plaintiffs Robert Anderson and Betty Anderson are residents of Texas County, Oklahoma, and their post office address is Box 1113, Guymon, Oklahoma 73942. Defendant is a corporation doing business in Seward County, Kansas. Defendant is referred to as Phillips in this Petition and such designation is intended to include the defendant corporation and any predecessor corporations in making gas payments hereinafter mentioned.

2) Plaintiffs are Phillips' royalty owners and are members of a class composed of all producers and royalty owners to whom Phillips made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A and the class may be divided into subclasses as follows:

(A.) A subclass consisting of producers and royalty owners who received payment from Phillips on or about December, 1975, of gas price increases pursuant to FPC Opinions 699 and 699H theretofore "suspended" by Phillips. (See Exhibit "1" hereto attached and made a part hereof.)

(B.) A subclass consisting of producers and royalty owners who received payments from Phillips on or about September, 1977, and March, 1978, of gas price increases pursuant to FPC Opinions Nos. 770 and 770A theretofore "suspended" by Phillips. (See Exhibits "2" and "3" hereto attached and made a part hereof.)

(C.) A subclass consisting of producers and royalty owners who received payment from Phillips in about September, 1978, of gas price increases pursuant to FPC Opinions Nos. 749 and 749C theretofore "suspended" by Phillips. (See Exhibits "4", "5" and "6" hereto attached and made a part hereof.)

3) Plaintiffs bring this action individually and as representatives of all of that class of producers and royalty owners referred to in Paragraph 2 above. Plaintiffs are informed and believe that the class which they seek to represent is composed of over 10,000 members, whose names and addresses are known to Phillips, but not to plaintiffs, and their number makes it impracticable to

join all of them in this action. Plaintiffs are informed and believe that formerly Phillips paid the plaintiffs and other class members all of their proportionate share of the proceeds of gas produced and sold; that beginning several years ago, and just when plaintiffs do not know, Phillips began receiving higher prices for the gas sold, but continued paying the class members at the old price. Plaintiffs are informed that Phillips commingled such so-called "suspended" money with its own money and invested and used the same for its own purposes. Phillips has not paid the plaintiff class or subclasses or anyone else for the use of such "suspended" monies held by Phillips during these periods of time. The Federal Power Commission issued its Opinion No. 699 on June 21, 1974, No. 699H on December 4, 1974, No. 749 on December 2, 1975, No. 749C on July 19, 1976, No. 770 on July 27, 1976, and No. 770A on November 5, 1976, which approved price escalations in rates for gas paid to Phillips but Phillips did not pay out to the class members until dates as above stated in Paragraph 2, the last date being September, 1978. The total amount of class members' money so held and finally paid over to the class members is not known to plaintiffs, but is known to defendant and is estimated by plaintiffs to be over $1,000,000.00.

4) The plaintiffs and other members of the class are entitled to recover from Phillips for its use of the money on any one or more of the following theories or for the following reasons:

(A.) The doctrine of unjust enrichment. (*Shutts v. Phillips Petroleum Company*, 222 Kan. 527, 567 P.2d 1292, Syl. 19; U.S. Cert. denied 434 U.S. 1068, rehearing denied 435 U.S. 961.)

(B.) The equitable principle that when one makes actual use of money belonging to another, it is re-

quired to pay interest on the money so retained and used. (*Shutts, supra,* Syl. 20.)

(C.) Equitable principles require that class members receive the same treatment as gas purchasers as to interest required by the Federal Power Commission on "FPC suspense monies". (*Shutts, supra,* Syl. 21.)

(D.) Phillips made an *express* agreement by filing corporate undertaking with the Federal Power Commission to pay interest on the "suspended" proceeds. (*Shutts, supra,* P. 564.)

5) The question of law and fact involved in this action is common to all members of the class and subclasses identified above and is as follows:

"Should Phillips pay interest to class members on such 'suspended' monies at the rate of 7% per annum to October 10, 1974, and at the rate of 9% per annum thereafter until paid over to class members, all in accordance with FPC Order No. 513-A, issued July 14, 1976?"

6) The claim of these plaintiffs is typical of all claims of the general class identified above and of all three subclasses and plaintiffs can and will fairly and adequately protect the interests of such class and subclasses and all members of the class and subclasses.

7) Prosecution of separate actions by individual members of the class and subclasses identified above would result in multiple lawsuits; would create a risk of inconsistent or varying adjudications concerning individual members of the class and subclasses and could establish incompatible standards of conduct for defendant.

8) The amount of interest due these plaintiffs from defendant is probably less than $1,000.00 each and it is

believed and so alleged by the plaintiffs that many of the members of the class and subclasses identified above have small amounts at stake. As a practical matter, many members of the class and subclasses would have no remedy if this action could not proceed as a class action.

9) Phillips has systematically and purposely withheld the money due the plaintiffs and other members of the class and subclasses and has used the money for its own purposes. Such action by Phillips without compensation to the class members for the use of the money has affected all members of the class in exactly the same way, except as to the amount due each, which can be easily computed through Phillips' records and computers. A class action is the only suitable means of redress to the plaintiffs and other class members.

10) The essential question at issue is the matter of collection of interest on money used by Phillips for several years and there is a community of interest among all members of the class and subclasses in this question and in the remedy. There is a "common fund" set up as to each of the subclasses subject to recovery in this action. The members of the class and subclasses are made up of residents and nonresidents of the State of Kansas, the above FPC opinions being nationwide gas pricing regulations. Class members are those affected by the national rates as set up by the FPC opinions above mentioned as distinguished from rates previously set up by FPC which affected only the individual rate making areas as defined by FPC, such as the Hugoton-Anadarko area.

WHEREFORE, plaintiff prays for an order of the court finding that this action is maintainable as a class action; for judgment in favor of plaintiff and other

members of the class for interest, costs of this action, attorneys' fees and expenses, and for all other proper relief.

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(Attachments omitted in printing)

IN THE DISTRICT COURT
OF SEWARD COUNTY, KANSAS

[Caption omitted in printing]

ANSWER, PRETRIAL MOTION AND COUNTERCLAIM

I.

ANSWER

COMES NOW the defendant Phillips Petroleum Company (Phillips) and for its answer to the plaintiffs' Petition alleges and states:

1. Phillips admits the allegations of paragraph 1 of the Petition.

2. Phillips denies the allegations of paragraphs 2 through 10 of the Petition except it is admitted that certain funds were disbursed by Phillips in accordance with Federal Power Commission Opinions Nos. 699, 699H, 749, 749C, 770 and 770A.

3. The Court is without jurisdiction of this purported nationwide class action. There is not a sufficient nexus between the State of Kansas and the claims alleged in the plaintiffs' Petition to confer jurisdiction upon the courts of the State of Kansas. Any such attempted exercise of jurisdiction by the courts of the State of Kansas would violate the laws of the State of Kansas, the Constitution of the State of Kansas, the Constitution of the United States of America and the Constitutions and Laws of the various states of the Union whose citizens and residents may have or claim some interest in the proceeding.

4. This action is not an appropriate class action, even if the Court had jurisdiction over said action, for the following reasons:

A. The claims of the named plaintiffs are not typical of the claims of the alleged class in that different legal relationships exist betwen the defendant and each of the purported class members. Phillips alleges that it has separate and distinct contractual relationships with each purported member of the alleged nationwide class and that each such member's rights and obligations are, and must be, initially determined in the context of its contractual relationship with the defendant. Since the contractual relationships vary widely in form and content, the claim of any particular purported class member is not typical with the claims of all other purported class members.

B. There is no common question of law that is common to all the members of the class. Each class member's right to relief is dependent not only upon his own particular fact situation but also upon the law of the jurisdiction wherein the said class member's alleged cause of action arose. The law in the various states, with respect to the obligations of Phillips and the purported class members, varies considerably from state to state and therefore no common question of law exists.

C. There is no common question of fact which is common to all of the class members. As hereinbefore alleged each class member's claim is dependent upon his particular contractual relationship with Phillips and his right to relief is dependent upon that particular fact situation together with the particular law of the state in which such claim arose.

D. The named plaintiffs are not adequate representatives of the class which they purport to represent. As hereinbefore alleged, significant factual

and legal differences with respect to each plaintiff are present and it may be in the interest of some class members to proceed on theories of recovery which would be inimical to the interests of the named class plaintiffs. Furthermore, the named class plaintiffs purport to represent a class not only of royalty owners but also of producers of natural gas although they themselves are not producers of natural gas and occupy a significantly different legal relationship to Phillips than do the producers. In many instances the producers themselves have relieved Phillips of any possible claim by the royalty owners and therefore claims and counterclaims may exist between the royalty owners on the one hand and the producers on the other hand. Because of such inherent conflicts between the positions of the two groups it is not ethically or legally possible for the named plaintiffs to represent a group composed of both competing interests.

5. Some or all of the claims of the plaintiffs and the purported class members are barred because of the contractual relationship existing between Phillips and the particular plaintiff or purported class member. For example, certain purported class members have specifically contracted with Phillips to allow Phillips to retain, without interest, any additional money associated with Federal Power Commission (FPC) action regarding proposed gas price rate increases. Other purported class members, and again by contracts with Phillips, have specifically released Phillips from any liability for interest on the additional money paid by Phillips after final FPC action on the several pending gas price rate increase requests.

6. The additional monies paid out by Phillips pursuant to the three FPC Opinions (Nos. 669, 770 and 749) related to the full time period covered by said Opinions. However, Phillips did not receive the monies

collected subject to refund pursuant to said Opinions until after the effective dates of the Opinions. Phillips denies that it either had possession of, or used, any of the so-called "suspense monies", on which the plaintiffs and purported class members claim interest is due, at any time prior to the actual receipts of the various monies collected subject to refund by Phillips.

7. Phillips offered to pay to the plaintiffs and to the members of the purported class an amount equal to the sums collected by Phillips subject to refund, as the same were received, on the condition that the recipient of the monies would agree to refund to Phillips such amounts as were ultimately determined by the Federal Power Commission (FPC) to have been paid in excess of the just and reasonable rate. Substantial numbers of producers and royalty owners accepted this offer and thereafter currently received the additional money. Phillips' offers to make such payments have been judicially held to bar a subsequent claim for interest on the funds held by Phillips from and after the date of the offer and without regard to whether or not the offer was subsequently accepted. This rule should be applicable, under the facts in this case, to all plaintiffs and purported class members. Accordingly, the interest claims of the plaintiffs and the purported class members are barred as a matter of law and/or on equitable grounds.

8. Following Phillips' offers to pay the money collected subject to possible refund to the plaintiffs and purported class members, some specifically directed Phillips not to pay them said money until such time as all FPC action was final. The interest claims of all those who did are barred.

9. Some or all of the claims asserted by plaintiffs and the purported class members are either barred or are not recognizable under the laws of the various jurisdictions wherein the alleged causes of action arose. It is alleged that the merits of the interest claim of each

purported class member must be determined in accordance with the law of the state in which the alleged cause of action arose.

10. Some or all of the claims asserted by the plaintiffs and purported class members are barred by the appropriate statutes of limitation and/or by the doctrine of laches, and/or by the doctrine of res judicata.

11. Some or all of the claims asserted by the plaintiffs and purported class members are barred by the defenses of Accord and Satisfaction, and/or Compromise and Settlement, and/or Estoppel, and/or Payment, and/or Release, and/or Waiver.

12. Phillips denies that it is liable for interest in any amount to any person or entity but alleges, in the alternative, that if such interest is awarded by the Court then the rate of such interest should be determined by the laws of the various states wherein the particular cause of action for said person or entity arose, and such interest should be computed on only those amounts of money actually received by Phillips, and only from and after the actual dates of the receipt of said money by Phillips.

WHEREFORE, having fully answered, the defendant Phillips Petroleum Company prays that this action be dismissed and that defendant have judgment herein for its costs.

II.

PRETRIAL MOTION

Pursuant to K.S.A. 60-212(d), Phillips moves the Court to hear and determine before the trial of the principal case, and prior to action by the plaintiffs for class certification, the defense contained in paragraph 3 of the foregoing Answer for the reason that if said defense is decided in the favor of Phillips, this action should be dismissed in whole or in part.

III.

COUNTERCLAIM

COMES NOW Phillips Petroleum Company (Phillips) and for its counterclaim against the plaintiffs and the purported class members herein alleges and states:

1. At all times relevant to this action, Phillips was a producer of natural gas subject to the provisions of the Natural Gas Act and the Federal Power Commission (now the Federal Energy Regulatory Commission). Phillips not only produced gas from leases in which it was the lessee but also purchased natural gas in the ordinary course of its business and made royalty distribution pursuant to a wide variety of contractual arrangements.

2. To the extent that Phillips has overpaid any monies to plaintiffs or any members of the purported plaintiff class in this action then Phillips claims a right to set off such amounts of overpayment against any sums found to be due from Phillips to said class.

3. To the extent Phillips performed royalty accounting functions and made the royalty disbursements on behalf of other natural gas producers, at their direction, or lack thereof, Phillips is entitled to be indemnified by such producers for any loss or liability which Phillips sustains herein.

4. As a setoff, Phillips is entitled to recover from the plaintiffs and all members of the purported plaintiff class herein for their proportionate share of administrative costs and expenses incurred by Phillips on behalf of said persons or entities in obtaining higher prices for gas over the years. This would include the right to recover those administrative costs, expenses and attorneys fees not only in proceedings culminated in FPC Opinions Nos. 699, 699H, 749, 749C, 770 and 770A but also all other Federal Power Commission or Federal Energy Regulatory Commission proceedings from June 1, 1954 to the present time.

5. In the event, and only in the event, that the Court determines that Phillips is liable for interest, Phillips is entitled to recover, from all producers within the purported plaintiff class, interest on any and all additional money paid by them to Phillips pursuant to FPC Opinions Nos. 586, 699, 699H, 749, 749C, 770 and 770A.

6. Phillips specifically reserves the right, in the event, and only in the event, that this case is certified as a class action, and after the membership of the class is made up, to plead further and more specific counterclaims against any and all class members who elect to be bound by the decision in this case. Until such time as the class is established Phillips cannot be more definitive about what such counterclaim will be, or against what persons or entities they will be plead.

WHEREFORE, having fully answered, Phillips prays for judgment in accordance with the foregoing allegations, for all costs, for attorney fees and expenses, for prejudgment interest, and for all other proper relief at law or in equity.

/s/ Joseph W. Kennedy
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& Kennedy, Chartered
Suite 430, 200 West Douglas
Wichita, KS 67202

/s/ James R. Yoxall
JAMES R. YOXALL
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Liberal, KS 67902

/s/ T. L. Cubbage, II
T. L. CUBBAGE, II
Phillips Petroleum Company
Legal Division
556 Frank Phillips Building
Bartlesville, OK 74004
Attorneys for Defendant
Phillips Petroleum Company

(Certificate of service omitted in printing)

IN THE DISTRICT COURT
OF SEWARD COUNTY, KANSAS

(Caption omitted in printing)

JOURNAL ENTRY ON
CLASS CERTIFICATION AND NOTICE

NOW, on this 21st day of May, 1982, this matter comes on for hearing on plaintiffs' motion to certify as a class action and determine notice, and defendant's motion to dismiss as to all members of the class not residents of Kansas. The following appearances are made:

Attorneys for Plaintiffs:

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Medicine Lodge, Kansas 67104

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GINDER & MOORE
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Cherokee, Oklahoma 73728

Harold K. Greenleaf
SMITH, GREENLEAF & BROOKS
Box 296
Liberal, Kansas 67901

Attorneys for Defendant:

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Phillips Petroleum Company
Legal Division
Bartlesville, Oklahoma 74004

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Wichita, Kansas 67202

James R. Yoxall
LIGHT, YOXALL, ATRIM & RICHARDSON
Box 1278
Liberal, Kansas 67901

Thereupon, the motions are presented and argued to the Court after the matters had been briefed by counsel. The Court, having read the briefs and heard argument of counsel, and based upon the files and records in this matter and the evidence presented, finds, AND IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The proposed class of parties plaintiff is extremely numerous and exceeds some 33,000 members and an actual joinder of all members is totally impracticable.

2. The claims of plaintiffs are typical of the claims of all the members of the class except that each owner may

be entitled to a different amount of interest and the interest to each owner, if allowed, would be too small to enable each to file a separate action.

3. The only questions of law and fact in this case are common to the entire proposed class, in that the sole issue appears to be whether defendant is liable for interest on the money received by it from purchasers of gas pursuant to opinions No. 699, 749 and 770 of the Federal Power Commission and withheld by defendant for a period from December 30, 1975, to July 1, 1980.

4. This action should be certified as a class action and the plaintiff class is defined as follows:

> "All royalty owners and overriding royalty owners to whom Phillips Petroleum Company made suspense royalty payments between December 30, 1975, and July 1, 1980, relating to Federal Powers Commission Opinions 699, 749 and 770 (which includes 699H, 749C and 770A)."

5. Notice of the pendency of this action, its nature and effects of any judgment shall be given to all members of the class. The form of such notice, which is approved by the Court, is attached hereto and made a part thereof. The defendant shall provide to the plaintiffs a list of all members of the class and their mailing addresses as shown by defendant's records. The defendant shall provide to plaintiffs pressure sensitive mailing labels for each member of the class which shall contain thereon their individual name and address. The plaintiffs shall cause the notice to be mailed to all members of the class by first class mail and the plaintiffs shall bear all expense thereof. The envelopes shall contain the following return information:

RETURN TO:

SMITH, GREENLEAF & BROOKS
Box 1039
Liberal Kansas 67901

The notice is to be dated June 15, 1982, and request for exclusion must be filed by August 1, 1982.

6. If any of the notices sent to class members are returned by the postal service as non-deliverable, the plaintiffs will notify defendant of the names; and defendant is to further check its records and provide plaintiffs with all information it has pertaining to such class member, so that notice may be provided to such person and/or such persons, heirs, devisees or assigns.

7. The plaintiffs' request to certify as a class other than the class set out herein is overruled.

8. The defendant's motion to dismiss as to non-resident class members is overruled.

/s/ Keaton G. Duckworth
Judge

APPROVED AS TO FORM:

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CHAPIN, PENNY & GOERING
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Medicine Lodge, Kansas 67104

Ed Moore
GINDER & MOORE
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Cherokee, Oklahoma 73728

Harold K. Greenleaf
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By /s/ W. Luke Chapin
One of the Attorneys
for Plaintiffs

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Box 1278
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By /s/ T. L. Cubbage II
One of the Attorneys
for Defendant

IN THE DISTRICT COURT
OF SEWARD COUNTY, KANSAS

(Caption omitted in printing)

NOTICE OF CLASS ACTION SUIT

TO: Royalty owners and overriding royalty owners to whom Phillips Petroleum Company made suspense royalty payments between December 30, 1975, and July 1, 1980, relating to Federal Power Commission Opinions No. 699, 749, and 770.

This notice is to inform you that you, as royalty owner or overriding royalty owner under an oil and gas lease in which Phillips Petroleum Company is an interest owner, are a member of the plaintiff class, in a court action against Phillips Petroleum Company.

The purpose of this Notice is to advise you of your rights and obligations in relation to this lawsuit.

This suit was filed in July, 1979, by the above named plaintiffs, individually and on behalf of all other royalty owners and overriding royalty owners to whom this notice is directed. Plaintiffs seek judgment against Defendant for the payment of interest on suspended royalty paid by Defendant between December 30, 1975, and July 1, 1980, attributable to increased gas sales prices approved by the Federal Power Commission in Opinions Nos. 699, 749, and 770. There are in excess of 30,000 gas royalty owners and overriding royalty owners who are members of the class.

Defendant Phillips has denied any liability to plaintiffs or members of the class described above.

The Court has made no rulings as to the merits of these claims or defenses, yet has held that this action is to be maintained as a class action. Accordingly:

1. By order of this court dated May 21, 1982, you have been found to be a member of the plaintiff class in this lawsuit.

2. As a class member, your interests are currently being represented by the three named plaintiffs and their attorneys of record listed below. Any class member, if he or she so desires, may appear in the case in person or through his or her own counsel.

3. You may elect to be excluded from the class, by sending the request for exclusion form which appears at the end of this notice to the Clerk of the Court addressed as follows:

Clerk of the Court
Seward County, Kansas
415 N. Washington
Liberal, Kansas 67901

This request must be mailed so as to be received on or before August 1, 1982. The Court has determined that all requests for exclusion received on or before that date will be granted without further hearing.

4. Judgment in this action, whether for the plaintiff class or the defendant, will be binding upon all class members except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to the plaintiff class, nor will excluded class members be held bound in this action if judgment is rendered for Phillips.

5. Plaintiffs' attorneys fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys, not exceeding one-third of the interest fund created. This means that if a judgment in your favor is entered, the court may award up to one-third of it to be paid to the plaintiffs' attorneys to compensate them for representing

your interests. If you elect to intervene with your own attorneys, your share of the favorable judgment will not be reduced. If you request exclusion from the class, you will not be assessed any attorneys' fees. If plaintiffs are unsuccessful, there will be no allowance of attorneys' fees.

If you want further information, please do not call or write the Judge or the Clerk of the Court, but call or write one of the attorneys listed below.

DATED: June 15, 1982

KEATON G. DUCKWORTH
District Judge

Attorneys for Plaintiffs:

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IN THE DISTRICT COURT
OF SEWARD COUNTY, KANSAS

Case No. 79-C-113

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, Individually and as representatives of certain others,

Plaintiffs,

vs.

PHILLIPS PETROLEUM COMPANY,
Defendant.

REQUEST FOR EXCLUSION

To the Clerk of the Court:

The undersigned respectfully requests to be excluded from the plaintiff class members in this case in accordance with the terms of the Notice of Pendency of Class Action dated June 15, 1982.

DATED _____, 1982.

Send to:

Clerk of the Court
415 N. Washington
Liberal, Kansas 67901

Signature: _____

Print Name: _____

Address: _____

_____

IN THE DISTRICT COURT
OF SEWARD COUNTY, KANSAS

(Caption omitted in printing)

AFFIDAVIT OF MAILING

STATE OF MISSOURI,

COUNTY OF JACKSON, SS:

Dan Hill, of lawful age and being first duly sworn, on oath states:

He is Vice President of Strahm Printing & Mailing Co., 415 West 10th Street, Kansas City, MO 64105; at the request of W. Luke Chapin, Ed Moore and Harold Greenleaf, attorneys for plaintiffs in the above entitled action, Strahm Printing & Mailing Co. printed Notices of Class Action Suit, of which the attached is a true copy, and printed envelopes with return address of Smith, Greenleaf & Brooks, Box 1039 Liberal Kansas, 67901, of which true copy is attached, and caused such notices to be mailed in the U.S. mail, postage prepaid, at Kansas City, Missouri, on or about June 18, 1982, to royalty owners and overriding royalty owners to whom Phillips Petroleum Company made suspense royalty payment between December 20, 1975, and July 1, 1980, relating to Federal Power Commission Opinion Nos. 699, 749, and 770, according to pressure sensitive labels which I am informed were furnished by Phillips Petroleum Company, to 33,241 such royalty owners within continental United States and 209 royalty owners outside continental United States; and I am further informed that a list of such persons, firms, corporations and entities to whom such notices were mailed will be furnished to the Clerk of the District Court of Seward County, Kansas.

Affiant further states that the total costs of such printing and mailing were $9,429.70.

/s/ Dan Hill
DAN HILL

(Jurat and attachment omitted in printing)

IN THE DISTRICT COURT
OF SEWARD COUNTY, KANSAS

(Caption omitted in printing)

AFFIDAVIT OF MAILING

STATE OF KANSAS,

COUNTY OF BARBER, SS:

W. Luke Chapin, of lawful age and being first duly sworn, upon oath states:

He is one of the attorneys for plaintiff class in the above entitled action; that heretofore Strahm Printing & Mailing Company, Kansas City, Missouri, printed and mailed approximately 33,000 notices of class action suit dated June 15, 1982; that more than 2,000 envelopes were returned from such first mailing; that such returned envelopes were sent to Phillips Petroleum Company, Bartlesville, Oklahoma; that Phillips Petroleum Company thereafter provided its mailing list No. 2, containing names and addresses, social security numbers if available, status code concerning the returned mailings and amounts of suspense monies paid to the persons to whom mailed, copy of such list being hereto attached, containing 2,058 undelivered notices; that thereafter and as of August 20, 1982, the court ordered that plaintiffs attempt to obtain better addresses for plaintiff class members to whom letters previously addressed have been returned, particularly those having been paid suspense royalties of $100.00 or more, making use of telephone calls to the extent feasible; that the office of Ed Moore, one of the attorneys for plaintiff class, through telephone calls was able to come up with better addresses for certain of those 2,058 undelivered notices, copy of

Ed Moore's revised list being attached; that notices were mailed to such revised list of names and addresses by me on September 13, 1982, copy of the revised notice being in accordance with the court's order of August 20, 1982, and being hereto attached and made a part hereof; that Phillips Petroleum Company also sent further return envelope information by its letter of August 23, 1982, and I mailed copy of notices to six persons whose names are checked in red on the attached Phillips list No. 3, such notices being mailed on August 25, 1982; that Phillips further sent list No. 4, hereto attached, containing names of decedents and updated names of heirs, devisees and legatees and representatives; and that I mailed copy of notice attached to all of such persons on September 13, 1982; that Harold Greenleaf compiled a list of former royalty owners and current royalty owners from correspondence he received from persons addressed in the first notice given, copy of such list being attached, and I mailed new notice to the current royalty owners shown on such list on September 14, 1982; that all of such notices were mailed by first class mail at Medicine Lodge, Kansas; that the total number of additional notices mailed allowing October 15 as opt out date were 366; that total cost of preparing and mailing such notices was $183.00.

/s/ W. Luke Chapin
W. LUKE CHAPIN

(Jurat and attachment omitted in printing)

REFERENCE TO PARTS OF THE RECORD REPRODUCED IN PETITION FOR WRIT OF CERTIORARI

The Order of the Supreme Court of Kansas filed May 11, 1984, denying rehearing is set forth at page A1 of the Petition for Writ of Certiorari.

The opinion of the Kansas Supreme Court of Kansas filed March 24, 1984, is set forth commencing at page A2 of the Petition for Writ of Certiorari.

The Journal Entry of Judgment of the District Court of Seward County, Kansas filed May 20, 1983, is set forth commencing at page A48 of the Petition for Writ of Certiorari.

Affidavit No. 4 (C. A. Roberts) of the District Court of Seward County, Kansas filed April 12, 1982, is set forth commencing at page A60 of the Petition for Writ of Certiorari.

No. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner

v.

IRL SHUTTS, *et al.*,
Respondents

On Writ of Certiorari to the Kansas Supreme Court

BRIEF AMICUS CURIAE OF AMOCO PRODUCTION COMPANY IN SUPPORT OF PETITIONER

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Attorneys for Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. May a state court in a nationwide class action, consistent with the Full Faith and Credit and Due Process Clauses, apply its own law to transactions occurring between non-residents in other States to which the forum has no connection?

2. May a state court in a nationwide class action, consistent with the Due Process Clause and cooperative federalism, assert jurisdiction over unnamed class members whose transactions arose entirely in other States and who are non-residents, neither having contacts with the forum nor having affirmatively consented to the forum's jurisdiction?

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IN THE

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PHILLIPS PETROLEUM COMPANY,
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IRL SHUTTS, *et al.*,
Respondents

On Writ of Certiorari to the Kansas Supreme Court

BRIEF AMICUS CURIAE OF AMOCO PRODUCTION COMPANY IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Amoco Production Company (Amoco) is a defendant in a nationwide class action suit brought by a single natural gas royalty owner in a state court of Kansas. Like the instant litigation (*Shutts II*), the class action against Amoco involves natural gas properties in ten States, albeit significantly more of the transactions (around 33% of the leases, but less than 20% of the money) have a Kansas connection. Like petitioner Phillips Petroleum, Amoco did not forward royalty payments related to nationwide price increases until it was certain that rates under the Natural Gas Policy Act of 1978 were not subject to refund. Once the price increases were finalized, Amoco promptly forwarded the accrued (suspense) royalties.

Unlike Phillips, Amoco made no attempt to withhold interest on the suspense royalties. Amoco forwarded to its royalty owners not only the suspense royalties but also interest based on the applicable statutes of the States in which the leases are situated.

Because the Kansas Supreme Court had previously indicated a willingness to hear nationwide class action suits under somewhat similar circumstances and apply Kansas law both to the applicable rate of interest and to whether interest on interest was payable, *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977) *cert. denied*, 434 U.S. 1068 (1978) (*Shutts I*), the class suing Amoco alleges that additional payments, based on Kansas law, not local law, are due to members of the class. This suit, *T.A. Dudley v. Amoco Production Company*, Case No. 80 C 34 (26th Judicial District Court, Stevens County Kansas) is currently at the class notice stage. Based on *Shutts I* and the instant case, *Shutts II*, there is every reason to believe that despite the fact Amoco forwarded the applicable interest to its royalty holders and Phillips did not, the rule in *Shutts II* will be applied to the approximately $6 million in suspense royalties having no connection with Kansas (beyond the fact of the litigation).

SUMMARY OF ARGUMENT

1. The decision of the Kansas court to apply Kansas law to contractual transactions having no connection with Kansas violates both the Full Faith and Credit and Due Process Clauses of the Constitution. Kansas is entirely without a legitimate interest in applying its internal law to transactions occurring between non-residents, in other States. The laws of the other States are outcome determinative on the question involved in this case. Not only is the defendant entitled to the protection those laws afford it, in our federal system of States the Constitution requires that the affected States be allowed to make their

own choices as to what is the appropriate public policy to govern transactions occurring within their borders.

2. Kansas uses the nationwide class action as a regulatory device to police out-of-state companies doing business in-state. But in so doing the Kansas courts need out-of-state plaintiffs for credibility and can only acquire them through the promise of a choice of law rule that guarantees the Nation's most plaintiff-oriented substantive law on the merits. The class action thus violates the rights of defendants by subjecting them to higher judgments than would be available elsewhere and, more importantly, leaves the States most concerned with the transactions helpless bystanders as their public policies are ignored by Kansas. By ignoring or misapplying the laws of sister States most affected by the transactions Kansas' use of the class action regulatory device creates inherent risks of thwarting the public policies of States vitally concerned with the treatment of their major industry. To use a device that creates such risks violates the cooperative federalism implicit in the Constitution.

ARGUMENT

1. The Decision Below Violates Both the Full Faith and Credit and Due Process Clauses by Applying Kansas Law to Transactions Having No Connection Whatsoever with the Kansas Forum.[1]

This is a case about a simple legal issue. What is the appropriate rate of interest to be paid on an amount clearly owed by the defendant to the plaintiffs? It is made more complex solely because it involves a nationwide class action where the overwhelming numbers of plaintiffs have no contact whatsoever with the forum. The Kansas Supreme Court has ruled that Kansas law,

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[1] Although the choice of law issue is placed second by Phillips, it will be treated first in this Brief, for the choice of law determination illuminates well the infirmities of a nationwide class action involving parties without forum contacts.

which is vastly more favorable to the plaintiffs than any other laws, sets the applicable rate of interest. The laws of other States, though clear and easily ascertainable, were rejected even for transactions occurring exclusively within their borders. Indeed, it took the Kansas Supreme Court but a single sentence to summarily toss aside the constitutions, statutes, and court decisions of Texas, Oklahoma, and Louisiana (to take just the three States most involved with the question of suspense royalties): "Compelling reasons do not exist to require this court to look to other state laws to determine the rights of the parties involved in this suit." 679 P.2d at 1181.

With the laws of the other States thus shunted aside, Kansas found that undertakings filed by Phillips with the Federal Power Commission (FPC) dealing with interest potentially payable to pipelines set the applicable Kansas rate on payments to royalty owners. Nothing in the Constitution prohibits Kansas from making this as an internal choice should it believe, as it does, that the equities of the parties and sound public policy demands it.

But nothing prohibits other States from disagreeing should they choose to strike a different balance in the producer-royalty owner relationship when the two have not agreed on how they wish to settle this problem. And not all States do agree that sound public policy demands the Kansas solution. Texas, in fact, takes an entirely different tact. In *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978) the Texas Supreme Court on identical facts (save not in the context of a class action) held that where a gas royalty agreement was silent on suspense royalties and the applicable rate of interest to be paid on them, the Texas statutory rate of interest filled the missing gaps. This statutory rate was decidedly below the rate of the FPC filings, and thus provided the royalty owner a less favorable result than the FPC would give an interstate pipeline or

than Kansas would give a similarly situated royalty owner. But that was no matter. Texas had a statutory rate of interest and that portion of the Texas Revised Civil Code governed. It was not that the Texas Supreme Court was unaware of the public policy of Kansas. *Stahl* was decided a year after *Shutts I* and cites the case, 569 S.W.2d at 485 n.5. *Shutts*, however, establishes public policy for the State of Kansas: that was not the public policy chosen by the court and legislature for the State of Texas.

The Oklahoma Constitution has a provision dealing with interest and there is a statute implementing it.[2] Like Texas this public policy of Oklahoma differs markedly from its Kansas counterpart. But unlike Texas, where the state supreme court has authoritatively answered this question, no Oklahoma court has been able to articulate the public policy of the State because all Oklahoma suspense royalty litigation is now carried on in Kansas.[3] Whatever may be said for the conclusions of the Kansas court on the merits of the appropriate rate of interest, Texas flatly disagrees and it would appear that other States might, too, if the Kansas courts would allow them a chance to speak.[4]

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[2] Oklahoma Constitution, Art. 14 § 2, implemented by 15 Okla. Stat. Ann. § 266.

[3] Named plaintiffs Robert Anderson and Betty Anderson are Oklahoma residents and owners of Oklahoma leases. They had commenced litigation in Oklahoma, but dropped it to join Irl Shutts, a Kansan (with leases in Oklahoma and Texas, but not Kansas), when he commenced the instant class action.

[4] E.g., Louisiana Civil Code, Art. 1938: "All debts shall bear interest at the rate of seven per centum per annum from the time they become due, unless otherwise stipulated." See *Wurzlow v. Placid Oil Co.*, 279 So.2d 749, 772-74 (La. App. 1973) (applying Art. 1938 to additional oil and gas royalties). Art. 1938 has been subsequently amended, effective July 12, 1982, to raise the interest payable to twelve percent.

What Kansas has done is to offer an open season for plaintiffs suing gas producers on out-of-state transactions so long as they find a similar transaction in Kansas. If other States were to adopt a like approach, plaintiffs' attorneys the Nation over could identify certain "magnet" forums where the substantive law most favored the plaintiff. These forums then would attract nationwide litigation by ignoring non-forum laws that would produce either a judgment or lower recovery for defendants. Such decisions from "magnet" forums would nullify the alternative public policies of other States no matter how strongly they were held.

While this sounds like a parade of horribles that simply could not happen in our federal union, the unhappy fact is that it has already happened. In Kansas, in this case.

No one disputes that *if* Phillips *agreed* how much interest to pay the royalty owners that agreement should be enforced. At times the Kansas Supreme Court decision reads as if such an agreement existed. Since *no* such agreement does exist, it is important to understand how the existence of such an agreement was implied.

The undertaking to pay interest referred to by the court below came about pursuant to regulations implementing § 4 of the Natural Gas Act. Phillips had applied for rate increases and the increases had been suspended pursuant to § 4(e). But under § 4(e) the suspension must terminate if a producer so moves after the proceedings have exceeded five months. In these circumstances the producer is required to agree to refund any portion of the rate subsequently found unreasonable and pay interest, set by regulation,[5] on the amount to be refunded. The undertaking—or "contract"—is thus be-

[5] 18 C.F.R. § 154.102(c)(2) (1983).

tween the producer and pipeline, not between producer and royalty owner. Thus the conclusion of *Shutts I* and *Shutts II*, repeated in the Respondents' Brief in Opposition to Certiorari at 13, that statutory interest rates "were not pertinent to the case since they applied only if there was no agreed interest rate" is simply inapposite. It would be correct if this were an action between Phillips and a pipeline company. But this is not. This is an action between Phillips and royalty owners. Their relationship is governed by contract, not by the Federal Power Commission. A royalty agreement might provide for an applicable rate of interest when royalties are suspended pending administrative proceedings, but if it does not, it is simply a contract where there is silence on issues relating to interest. Under these circumstances one must seek an answer in local law, not that of Washington, D.C. The local laws, as already shown, will produce radically different results. Yet Kansas ignores them. In our federal system such a result can not stand.

As the plurality in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) noted, "a State which has no significant contact or significant aggregation of contacts, creating state interests with the parties and the occurrence or transaction" may not impose its rules on others. Just what are the Kansas interests? First, Kansas has a strong interest in protecting Kansas residents. Second, Kansas has a strong interest in policing transactions occurring in Kansas regardless of the residency of the parties. But these two strong interests account for less than 3% of the entire suit. The court below brought in the other 97% —despite a total lack of contacts with the forum—with two more alleged interests. The first added interest was adjudicating claims of class members having no contact with Kansas beyond this case because they had the desire to see Kansas law applied to their trans-

actions. The second was the fact that the defendant does business in Kansas.[6]

These two additional interests are simply insufficient under *Hague* to authorize displacement of the laws of the States most interested in the transactions. Texas, Oklahoma, and Louisiana are major gas-producing States with strong public policies governing the relationship of producer to royalty owner.[7] As noted, those policies on the issue of interest on suspense royalties are much more favorable to the producer than the Kansas rule. It may well be that from a Kansas perspective the policies of these States are backward and wrong-headed. But they exist nevertheless, and the Federal Constitution guarantees to each State precisely this option of determining its own internal policies (in the absence of federal legislation). It thus is not only not compelling to displace the choices of citizens of other States on matters involving their significant internal industries, it is unconstitutional.

[6] The latter point was buttressed by statements concerning a "common fund," a legal fiction used to shore-up both the jurisdictional and choice of law conclusions. Apparently the "common fund" then justifies the bootstrap that since Phillips is in Kansas, it follows naturally that the "common fund" is too. Why this fiction assists the Kansas choice of law conclusion is unclear. One would expect that if the "common fund" exists, it would be controlled not by the laws of the State of litigation but by either the laws of the State of incorporation or those of the State of principal place of business, Delaware and Oklahoma respectively.

[7] Incredible as it seems when contrasted with the result reached, the Kansas Supreme Court understands precisely this point when the affected State's name is Kansas:

> "While [the Kansas royalty owners] may constitute only a small percentage of the total number of class members, this state has a significant interest in protecting the rights of these royalty owners both as individual residents of this state and as members of this particular class of plaintiffs. Oil and gas production is a significant industry in this state. Kansas has an interest in ensuring that out-of-state oil and gas companies which do business within this state do not conduct themselves unlawfully or violate the rights of resident royalty owners to whom the company is responsible."

Shutts II, 679 P.2d at 1174.

Could it be seriously asserted that Kansas could by legislation reach the same result as the Kansas Supreme Court reached? Suppose that after debate the Kansas legislature determines that it should police the suspense royalty practices in all fifty United States jurisdictions of oil companies doing business in Kansas. Accordingly it passes a statute requiring any oil company present within Kansas to conform all transactions involving suspense royalties to Kansas law. At the outset it should be noted that the case for sustaining such a law is *greater* than in the instant case. As both *Shaffer v. Heitner*, 433 U.S. 186 (1977) and *Kulko v. California Superior Court*, 437 U.S. 84 (1978) demonstrate, pursuit of a policy specifically declared by the legislature is entitled to more weight than pursuing generalized state interests nowhere found in relevant legislation. Yet even with the added backing of legislation, it is inconceivable that Kansas could, consistent with the Commerce, Due Process, and Full Faith and Credit Clauses, impose its will on the citizens and legislatures of Texas, Oklahoma, and Louisiana. No matter how happy a resident of those States might be that Kansas was attempting to give him a more favorable law than he was afforded by the political process of his home State,[8] that would not constitute a legislatively valid interest for Kansas to act. Kansas simply lacks any interest in transactions occurring between non-residents, in other States, and affecting Kansas only by the presence of a plaintiff forum shopping for the best available law to govern his trans-

[8] "The plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." *Shutts II*, 679 P.2d at 1181.

actions.[9] The Constitution contains limits on extra-territorial reach. See *Hague*; *Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511 (1935); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

2. Nationwide Class Action Suits Involving Transactions Wholly Outside the Forum Violate Both the Due Process Clause and the Cooperative Federalism Implicit in the Constitution by Commandeering Out-of-State Plaintiffs to Effectuate the Regulatory Purposes of the Forum In Derogation of the Interests of Non-Forum States.

Class actions can be major regulatory devices for States. Rather than expending scarce enforcement resources to police a variety of marketplace transactions, the class action device can be substituted instead. The promise of substantial attorneys' fees in the event of victory provides the needed incentive for private parties to bring unlawful or even questionable transactions to judicial attention.

The Kansas Supreme Court is fully cognizant of this. The opinion below at a variety of points[10] explicitly adverts to regulatory justifications for the instant class action tying them in with the need to police out-of-state corporations doing business in its significant oil and gas industry.[11] Precisely what makes this regulatory use of the class action so attractive internally also creates the unconstitutional extra-territorial effects.

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[9] If the class action aspect of this suit were stripped away, it is clear that a Texas resident royalty owner under a lease executed in Texas covering oil and gas rights in Texas could not enter Kansas and sue Phillips and have Kansas courts apply Kansas law. Kansas is so wedded to situs law that it remains one of the few States yet to move from the place of wrong rule in tort conflicts. R. Weintraub, Commentary of the Conflict of Laws 308 n.54 (2nd ed. 1980) citing *McDaniel v. Sinn*, 194 Kan. 625, 400 P.2d 1018 (1965).

[10] E.g., 679 P.2d at 1166, 1173, 1174.

[11] See note 7 *supra*.

Were this a class action where the plaintiffs were all Kansas residents or owners of Kansas leases this regulatory device would raise no federal questions at all. But when a local regulatory device has interstate effects, then the Federal Constitution imposes limits on its use. To understand what the limits are, one must look to how the Kansas courts have crafted class action policies to police the practices of oil and gas producers.

First, a regulatory scheme, just like a criminal statute, needs a credible threat of enforcement. One of the attractive features of class action litigation is that it can bring together numerous small claims that would otherwise be ignored into a single suit which then can reach settlement with the defendant. The key is having enough plaintiffs to get the amount in controversy high enough to attract plaintiffs' lawyers and the attention of the defendant. Yet just as individual claims might be so small that litigation would not occur but for the class action, so too, a class might be too small to justify the litigation. In fact that explains perfectly why a nationwide class action rather than a Kansas class action was selected on these facts. The Kansas interest in the suspense royalties involved in this litigation whether measured by Kansas leases or Kansas residents is *de minimis*, ¼ of 1% of the leases and $123,000 out of $11.3 million.

Like most affected States—but not Oklahoma[12]—Kansas has an opt out class action procedure. Since inertia is the guiding aspect of small class action claims, most plaintiffs will remain in the class under an opt out procedure. Because of the regulatory goals the class proceeding is supposed to accomplish, it is essential that plaintiffs remain in the class. Thus while Kansas related all who wished to opt out of the instant case, the court made it clear that its statute "gives the court power to deny exclusion to class members, be they residents or non-

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[12] 12 Okla. Stat. Ann. § 13(C).

residents of Kansas, whose inclusion is essential to the fair and efficient adjudication of the controversy." 679 P.2d at 1170. That the Kansas courts are serious about prohibiting opting out by certain plaintiffs can be seen from a recent settlement order in a class action against Amoco involving "market value" leases [13] where twelve requests for exclusions ranging from eight individuals to Mobil Oil Corporation were denied by the judge without supporting reasons.[14]

Such denials make sense given the regulatory nature of the class action. Requests to opt out are inconsistent with the regulatory goals of the class action when those seeking to opt out represent too much of the potential final judgment. The credible threat can not be maintained if too many plaintiffs choose to leave the class and the resulting class has insufficient monetary claims against the defendant to provide the necessary impetus to litigate.

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[13] The substantive issue was whether, in a lease stating that royalty payments would be based on "market value," the "market value" clause should be interpreted to mean (1) the price actually received by the producer, (2) the highest federally authorized price for the Hugoton field, or (3) a price higher than the highest federal price based on sales of intrastate gas and/or comparative prices for alternative competing fuels. The Kansas Supreme Court in a prior appeal had ruled with the plaintiffs that neither price actually received nor federal regulations fixing a maximum price receivable were obstacles to the setting of an even higher rate as the "market value" for the purpose of computing royalties owed by producers. The court did note, however, that a trial court could consider evidence concerning maximum federal price regulations in setting the "market price." *Matzen v. Cities Service Oil Co.*, 233 Kan. 846, 667 P.2d 337 (1983).

[14] This case action is also styled *T.A. Dudley v. Amoco Production Company*; its number is 5188; and it is also in the Twenty-Sixth Judicial District, Stevens County. The portion of the opinion as well as the list of plaintiffs denied the right to opt out may be found in the Appendix to this Brief.

Even the promise of a large enough class of plaintiffs to provide the credible threat to the defendants is insufficient if plaintiffs determine that the class action should be prosecuted elsewhere. Experienced plaintiffs' counsel will litigate where the laws of the forum offer the most promising chances of recovery. As the choice of law point has already demonstrated, Kansas meets this criterion perfectly. It promises—and delivers—the best available substantive law for the plaintiffs. And suddenly the decision of a State that still applies the law of the place of wrong in tort conflict actions to apply forum law in natural gas lease cases makes perfect sense.[15] The former are private law cases, while the latter are important regulatory cases needing a special choice of law rule to effectuate their broad purposes.

As beneficial as this regulatory use of the class action may be for Kansas, it imposes unconstitutional costs on both defendants and other affected jurisdictions. The costs to defendants are easiest to state. Recoveries will be higher in Kansas than anywhere else and the defendant even subsidizes the plaintiffs' counsel in accomplishing the feat. Furthermore pre-transaction planning as well as post-transaction settlement is made more difficult by the Kansas determination that only its laws are relevant to out-of-state transactions.[16]

The defendants are simply caught in the middle of the regulatory device. As *Shutts I* and *Shutts II* make clear, the producers were obligated under Kansas law to forward substantial sums of interest to Kansas residents. And they should have done so earlier. But to effectuate this public policy of Kansas, the defendants are also be-

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[15] See note 9 *supra*.

[16] Still, if one assumes *arguendo* that the choice of law determination is not independently unconstitutional, at least the gas industry henceforth can plan transactions with full knowledge of the application of Kansas law.

ing forced to grant recoveries for transactions in other States significantly higher than those States would authorize. The winners in this are the plaintiffs' attorneys who will probably take one-third of the entire judgment [17] and the State of Kansas which serves notice on out-of-state producers what their duties are. The producers are obviously losers, but so too are the affected States which have watched their laws and policies shunted aside because of the internal needs of Kansas. This is not the federalism the Framers envisaged.

The other States are helpless bystanders to the usurpation of their rights to regulate their internal transactions. Plaintiffs offered more than they are entitled to cannot be expected to protect their home State's jurisdiction to regulate; even if they tried, Kansas might well deny their right to opt out. Thus, an affected State like Texas, Oklahoma, or Louisiana has no way to protect its interests; its problems automatically flow north to Kansas for solution.

While one might think added interest on suspense royalties is hardly a major internal problem, the fact is that the oil and gas law of Kansas is different from that of the States most affected by the problem. Kansas may need Texas and Oklahoma plaintiffs in order to effectuate *its* public policies, but for Texas and Oklahoma the relationship of producer to royalty owner is far more important than for Kansas because the oil and gas industry plays such an important part in the States' economies.

Indeed the importance of oil and gas to the major producing States explains why a class action even con-

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[17] No award of attorneys' fees was before the Kansas court. At the end of its opinion it discusses attorneys' fees in traditional general terms leaving implementation to the discretion of the trial court. *Shutts II*, 679 P.2d at 1181-83. In the *Dudley* Settlement Order, note 14 *supra*, attorneys' fees were awarded at one-third of the amount of settlement.

strained by valid choice of law rules still unconstitutionally interferes with the domestic policies of the affected States. Even if Kansas applied the relevant local laws the class action would be improper because of the excessive risks of misinterpretation of the public policies of the affected States. There is ample evidence on this record that bringing multi-state plaintiffs in for a class action will result in the slighting or misinterpretation of the relevant law. At one point the Kansas Supreme Court rather proudly notes that if it did not decide the case, then plaintiffs would be left without a remedy because their States' statutes of limitations had run. 679 P.2d at 1169. Nothing was cited for this incredible proposition and that is hardly surprising since it is flatly wrong. The relevant tolling statutes would have preserved the plaintiffs' claims had the Kansas Supreme Court dismissed those plaintiffs without forum contacts.[18]

If Kansas can overlook an elementary point such as the existence of tolling statutes, then any aspect of non-forum law is subject to error. What is needed is a prophylactic rule, based on cooperative federalism and due process, that prohibits this type of nationwide class action. Only through such a rule can the regulatory interests of all States be protected from the inadvertent error that is inherent in any determination to hear a class action implicating the laws of numerous States. In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) this Court ruled that the interest of Texas in controlling its oil and gas leases was sufficient to require abstention and dismissal of a diversity case where the sole risk was misinterpretation of Texas law. That same risk of misinterpretation is inherent in the device selected by Kansas to police out-of-state producers doing business within its borders and a similar result is justified on these facts.

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[18] Vernon's Texas Rev. Civil Stats., Art. 5529; 12 Okla. Stat. Ann. § 100; Louisiana Civil Code, Art. 3518.

Furthermore, this is not a situation like diversity or a normal transient cause of action case where a court is, of necessity, forced to look to the laws of another jurisdiction and do its best with them. The Kansas courts are not passive participants in federalism in this case; they have actively encouraged multi-state litigation without consulting non-forum plaintiffs. Under these circumstances the costs of misapplication of the relevant State laws are simply too high. They are no part of the fact of a federal system. Instead they are an unconstitutional outcropping of a simple error: a single State forgetting that it is but one of fifty.

CONCLUSION

Two years ago this Court heard oral argument in *Gillette Co. v. Miner, cert. dismissed,* 459 U.S. 66 (1982), on the issue of nationwide class actions. In that case the Illinois Supreme Court had determined that the issue of class manageability would be decided by the number of sub-classes based on the varieties of local laws. 87 Ill.2d 7, 428 N.E.2d 478, 484 (1981). Here, by contrast, the Kansas Supreme Court has solved the manageability problem by the amazing determination that Kansas law governed all transactions in the United States even though 97% of them lie beyond its borders and involve persons whose only contact with Kansas is receipt of notice of the suit. To allow a state court to determine the property and contract rules that will govern transactions in other States on the sole basis that a foreign corporation can be found within its borders turns choice of law into an unconstitutional joke. Obviously if Kansas can do this on these facts then any other willing State can do the same in a different area. This aggressive parochialism shows no respect for the sovereign determinations of sister States; it poses a "substantial threat to our system of cooperative federalism." *Nevada v. Hall,* 440 U.S. 410, 424

n.24 (1979). Accordingly the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

ORDER OF THE TWENTY-SIXTH
JUDICIAL DISTRICT
DISTRICT COURT OF KANSAS IN

T.A. DUDLEY, *et al.*

v.

AMOCO PRODUCTION CO.

CASE NO. 5188 (STEVENS COUNTY)

AUGUST 30, 1984

There came on for consideration next the request of certain members of Plaintiff Classes who had filed requests to opt out of the Plaintiff Classes pursuant to the Order of Class Certification dated March 17, 1975 and said Order for Hearing dated May 21, 1984, and the Court, having considered such requests, and having heard and considered the evidence, arguments, and authorities of all parties desiring hearing thereon, and being of the opinion that such requests to opt out of the Plaintiff Class should be denied and that all such class members should be included in Plaintiff Classes and the Settlement Agreement, it is therefore,

ORDERED, ADJUDGED AND DECREED that the requests to opt out of Plaintiff Class, which were filed herein by the persons, firms and corporations named in Exhibit "A" attached hereto, be, and the same are hereby denied and all such persons, firms, and corporations are included in Plaintiff Classes and the Settlement Agreement.

EXHIBIT A

T.A. Dudley, et. al., v.
Amoco Production Company,
Case No. 5188

Requests for Exclusion

Name	Date Filed
Mildred Lindner Redd (withdrawn 06/15/77)	06/ /75
Juanita Frazee	06/16/75
Bertha Schmeltz	06/18/75
Mid-American Oil Company	06/18/75
Donald M. Sharrow	06/20/75
Spencer B. Cone	06/20/75
Gloyd L. Shaw	06/25/75
Mabel E. Darby Kropf	06/25/75
Mobil Oil Corp.	06/27/75
Minnie C. Kell	06/30/75
J. C. Wilkens	07/07/75
The Cherokee & Pittsburg Coal & Mining Co.	07/10/75
Ashland Oil, Inc.	07/14/75

NO. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,

Petitioner,

V.

IRL SHUTTS, ET AL.,

Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Kansas

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING REVERSAL

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CASES

NO. 84-233

IN THE
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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") has previously appeared in this cause to argue in support of the Petition for Certiorari. It now appears to present its arguments on the merits.

LFA is a nonprofit corporation supporting the operations of a tax exempt public interest law firm.* It is located on the campus of the South Texas Law School in Houston, and it shares certain personnel and activities with the law school. LFA's goals include the reasonable construction of regulation and the preservation of the values of federalism. In support of these goals, LFA has appeared as amicus curiae in this honorable Supreme Court,** in the federal courts of appeals, in the federal district

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* "Public interest law firm" is a designation made by the Internal Revenue Service pursuant to its regulations.

** In some instances, LFA has appeared in its own name, as here. In others, its attorneys have appeared as representatives of such diverse

courts, and in the courts of the several States.

The case at bar presents substantial questions of due process and interstate federalism. The Kansas Supreme Court correctly treated the class action in this case as a regulatory device.[1] But what the Kansas court did not acknowledge is that different jurisdictions may wish to take different approaches to both class actions and regulatory schemes and may attempt to diminish harmful and costly effects attributable to regulation itself.[2]

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clients as professional or trade associations, associations of state government officers, individuals, States, and political subdivisions.

1 For example, the Kansas court mentioned Kansas' interest in regulating the conduct of oil and gas producers within the territorial confines of Kansas. Appendix A28. In fact, class actions are just as effectively a type of regulatory control over the conduct of business as regulation by a consumer protection agency or oil and gas board.

There may be even greater concern, however, for the abuses of regulation by class action than for abuses of other kinds of regulation. Any attorney, whether responsive to state policy or not, has the ability to bring a class action entailing enormous litigation costs without regulatory supervision over the decision to cause those costs. See note 19 infra.

2 Scholarly theories are diverse and inconsistent, and there is a substantial literature on the subject. See, e.g., Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 HARV. L. REV. 718 (1979); Note, Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction, 25 HASTINGS L.J. 1411 (1974); Comment, State Court Jurisdiction over Multistate Plaintiff Class Actions: Minimum Contacts and Miner v. Gillette, 69 IOWA L. REV. 795 (1984); Note, Toward a Policy-Based Theory of State Court Jurisdiction Over Class Actions, 56 TEXAS L. REV. 1033 (1978). Numerous other articles and notes are cited in these works.

In Illinois, some commentary has been harshly critical of Miner v. Gillette Co., 87 Ill.2d 7, 428 N.E.2d 478 (1981). See Note, Illinois Multistate Plaintiff Class Actions: Abrogation of Jurisdictional Limitations on State Sovereignty, 31 DEPAUL L. REV. 471, 496 (1982) (". . . the Miner opinion invites an onslaught of trivial

SUMMARY OF ARGUMENT

I.

A. Interstate Federalism as a Concern Underlying Jurisdictional Requirements. This Court has repeatedly pointed out that one reason for having jurisdictional requirements is to protect interstate federalism. Many States have determined that class actions themselves cause enormous regulatory costs and have used personal jurisdiction as a means of restricting them accordingly. Kansas has here countermanded those States' decisions in derogation of the federal system and has imposed regulatory costs upon citizens elsewhere that they might not have chosen to incur.

B. Rights of Class Action Defendants. If Kansas' decision stands, the legitimate interests of defendants in finality of judgments can only be resolved by the complex and draconian invention of a federal body of law mandating res judicata in the absence of personal jurisdiction. Such a step would not only conflict with established principles but would create formidable practical difficulties.

C. Interests of Class Members. Plaintiffs have sometimes opposed class certification. They are in a position similar to that of defendants in that they face potentially binding adverse adjudication. In fact, the Kansas court's reasoning would support with equal force the abolition of jurisdictional requirements for classes composed of defendants.

II.

"Magnet" Forums and Frustration of Other States' Regula-

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suits to be filed in Illinois, suits that the state will have little reason to consider"), cf. Note, 71 ILL. B.J. 184 (1982). One article favorable to the decision was written by a member of the firm that served as plaintiff's class counsel. Ross, Multistate Consumer Class Actions in Illinois, 57 CHI-KENT L. REV. 397 (1981).

tory Policies because of Kansas' Choice-of-Law Approach. The Kansas court's approach to choice of law would encourage claimants' attorneys to seek the one "best" forum in every multistate class action. This "magnet" forum would be the one among the fifty states that would be most certain to hold against the defendant and award maximum damages, ignoring all other States' laws. The frustration of other States' regulatory policies would follow naturally.

III.

Kansas' Erroneous "Common Fund" Reasoning. This case does not even remotely resemble the "common fund" cases. The Kansas court's reasoning in this regard would support the abolition of choice-of-law and jurisdictional requirements in every multistate class action.

ARGUMENT

I. THE MAINTENANCE OF MULTISTATE CLASS ACTIONS IN THE ABSENCE OF PERSONAL JURISDICTION ADVERSELY AFFECTS THE REGULATORY POLICIES OF STATES IN A FEDERAL SYSTEM, AS WELL AS THE INTERESTS OF CLASS PLAINTIFFS AND DEFENDANTS.

A. The assertion by Kansas of jurisdiction here is inconsistent with interstate federalism and imposes costs on other States that they might not choose for themselves.

Amicus acknowledges that, in *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee,*[3] this Court subordinated the interstate federalism aspect of personal jurisdiction to the individual liberty interests of parties. However, in *World-*

3 456 U.S. 694, 702-03 n. 10 (1982).

Wide Volkswagen Corporation v. Woodson,[4] the Court had, shortly earlier, said the following:

> The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigation in a distant or inconvenient forum. *And it acts to ensure that the States, through the courts, do not reach out beyond the limits imposed upon them by their status as coequal sovereigns in a federal system.*

The Kansas court's decision is in derogation of this principle, which is expressed in statements tracing back to this Court's opinion in *International Shoe Company v. Washington.*[5]

An example of the conflict in State policies regarding class actions may be found in *Miner v. Gillette Company,*[6] in which this Court granted certiorari but later dismissed for lack of finality. Gillette gave away hundreds of thousands of free items in a promotional effort but underestimated demand. It offered a refund and substitute to the remainder of applicants. The class complaint charged that this ostensibly innocent conduct constituted a deceptive concealment by Gillette of the fact that it did not have sufficient merchandise to give to all who asked.

There are two ways to regard such a claim, either of which might be subscribed to by a conscientious state government. The Supreme Court of Illinois regarded the class action in question as

4 444 U.S. 286, 291-92 (1980) (emphasis added). The Court concluded that the jurisdictional limit of due process was "an instrument of interstate federalism" protecting the "orderly administration of the laws" of other States. Id. at 294, quoting International Shoe v. Washington, 326 U.S. 310, 317 (1945).

5 See note 4 supra.

6 87 Ill.2d 7, 428 N.E.2d 478 (1981).

a valuable regulatory protection for consumers. Another reasonable view, however, is that the action in *Miner v. Gillette Company* represented a kind of regulation that could raise costs for all consumers (both in Illinois and in every other State) disproportionately to its putative benefits. A State other than Illinois might conclude that the labelling of apparently innocuous conduct as deceptive[7] reduces the availability of goods and services,[8] because producers must protect themselves from unpredictable liability. The ease of blackmail,[9] disproportionate enrichment of class counsel, and inevitable frustration of state policy that results from even conscientious efforts to adjudicate fifty sets of complex state laws,[10] might be further concerns to such a State. Particularly when, as in *Gillette*, there was no monetary loss to any consumer, and potential recoveries were only a few dollars, a thoughtful state citizenry might choose to avoid encouraging multistate class actions such as those certified by Kansas and Illinois, as a means of protecting itself from the costs and disadvantages of such actions.

7 A State might also conclude that the labelling of apparently honest conduct as deceptive trivializes the law and results in oppression. Cf. Comment, supra note 2, 69 IOWA L. REV. at 810.

8 Cf. R. POSNER, ECONOMIC ANALYSIS OF LAW ch. 6 (2d ed. 1977).

9 Id. at 474. A class action "places the lawyer in [a position that] relieves him of accountability, which is bad, because his private goal diverges from the social goal of obtaining a judgment equal to the social costs of the violation." Id. at 450.

10 It is unlikely, for example, that a local state court will have ready access to statutory and decisional law of all fifty states. It is equally unlikely that all counsel will. The removal of decisional law from its procedural context and the complexity of the kinds of consumer and energy laws at issue make appropriate understanding of all fifty jurisdictions' laws unlikely, not to mention the possibility of the forum's disregard of those laws, as in the present case. See Note, 92 HARVARD L. REV., supra note 2, at 734; Comment, 69 IOWA L. REV., supra note 2, at 804 (concluding that "the usual risks involved in interpreting unfamiliar laws increase exponentially in a nationwide class action").

Indeed, it is arguable that the majority of States have already made this choice by declining to adopt proposed legislation that would sanction multistate class actions on a reciprocal basis. The Uniform Class Actions Act[11] provides two means by which a court can obtain jurisdiction over a class of multistate plaintiffs: (1) by the presence of minimum contacts or (2) by a reciprocal recognition of the binding effect (i.e., by a State's consenting to have its citizens bound by class actions elsewhere). The Uniform Act respects interstate federalism concerns, and it is notable that it would require minimum contacts here. Texas, Oklahoma, and the majority of States have declined to adopt the reciprocal provisions of the Act.[12] Even upon full consideration, they might decide not[13] to adopt them, if they concluded that their citizens' interests would be better served by a narrower class action approach entailing lower regulatory costs and fewer disadvantages. Kansas and Illinois have countermanded this choice.

B. Unless this honorable Supreme Court were to undertake the draconian step of forcing all fifty state

11 UNIFORM CLASS ACTIONS ACT sec. 6 provides:

(a) A court of this State may exercise jurisdiction over any person who is a member of the class suing or being sued if:

(1) a basis for jurisdiction exists or would exist in a suit against the person under the law of this State [or]

(2) the state of residence of the class member, by class action law similar to subsection (b), has made its residents subject to the jurisdiction of the courts of this State.

(b) A resident of this State who is a member of a class suing or being sued in another state is subject to the jurisdiction of that state if by similar class action law it extends reciprocal jurisdiction to this State.

12 Only North Dakota has adopted the reciprocal feature of the Uniform Act. See N.D. R. CIV. P. 23(f).

13 Cf. Scher, Uniform Class Actions: A Critical View, 63 A.B.A.J. 840 (1977). Oklahoma has continued to require opt-in and has thus expressed its preference to confine class litigation more narrowly. Okla. Stat. Ann. Tit. 12, sec. 14.

courts to give res judicata effect in the absence of personal jurisdiction, defendants could not be sure of fair, binding judgments and would be discouraged from settling multistate class actions.

The fifty states supreme courts are not bound to give *res judicata* effect to judgments rendered by courts without personal jurisdiction. Understandably, many do not give such effect in class actions lacking personal jurisdiction.[14] Defendants therefore cannot know whether the judgments that end multistate class actions will be given binding effect, and indeed they can be certain that it is the carefully considered policy of many States not to do so.

This lack of binding effect of class actions without personal jurisdiction is especially disadvantageous in the event that a defendant wishes to accept a settlement overture. The vast majority of class actions settle. Settlement is strongly favored because class actions are uncertain and enormously costly. However, the defendant is particularly likely to be subjected to a "heads I win, tails you lose" approach in multistate class actions. If the defendant happens to prevail at trial, or if the defendant settles for an amount that plaintiffs elsewhere think is inadequate, there is every reason to expect that nonresident class "members" over whom the court had no jurisdiction will relitigate in their home forums[15] and will be sympathetically received.

14 For example, Klemow v. Time, Inc., 466 Pa. 189, 352 A.2d 12 (1976), and Feldman v. Bates Mfg. Co., 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976), conflict with Shutts and Miner. See Petition for Certiorari at 9-11.

15 The Kansas Court did not consider the viability of multiple overlapping national class actions, in which two or more States attempt to adjudicate the same claimants' rights. See, e.g., in re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982) (involving overlapping class certifications). The decision below enhances the likelihood of such conflicts without providing guidance as to their resolution.

This discouragement of settlement is one of the least attractive features of the Kansas court's decision.[16]

The important point is that this honorable Supreme Court cannot solve these difficulties by a simple decree. It can do so only by the draconian step of creating and supervising a universal federal body of law governing *res judicata* and by requiring the fifty state supreme courts to extend binding effect in the absence of personal jurisdiction.[17] Such a step would be both inconsistent with federalism and impractical.

This court has already rejected such a pervasive, general law of *res judicata* in the class action context. In *Donovan v. City of Dallas*, 377 U.S. 408 (1964), a state court attempted to enjoin relitigation in federal court of a state-court class action in which defendant had prevailed. As this Court held, "whether or not a plea of *res judicata* in the second suit would be good is a question for the [second] court to decide."[18] Presumably, this

16 In fact, Amoco Producing Company actually made an effort here to settle possible obligations by making payments of interest in amounts it determined were lawful in each respective State. It was nevertheless subjected to a Kansas class action parallel to that against Phillips, seeking more interest. Dudley v. Amoco Production Co., No. 80-C-34 (Dist. Ct. Stevens Cy., Kan., pending). The possibility that a good faith settling defendant may be subjected to such treatment is very real, and the lack of assurance to the contrary may cause a defendant to regard as unwise a settlement offer that it would otherwise accept.

17 Such a principle has never been thought to be a consequence of the full faith and credit clause, which requires that the first judgment be within the first court's jurisdiction. An extension of the clause would conflict with prior decisions to that effect and would create the theoretical and practical difficulties discussed here.

18 Literally, the Court stated that the question was one for the "federal" court (which was the second court) to decide, and it emphasized the statutory jurisdiction of federal courts. Since every state provides similarly by statute for its courts' jurisdiction, the principle applies to both state and federal courts.

deference to coequal sovereignties would extend to other, coequal state courts, which should have authority to determine the preclusive effect of a judgment rendered without jurisdiction just as they would other issues in the suits before them.

Furthermore, the practical difficulties of supervising a general federal requirement of res judicata in class actions without personal jurisdiction would be formidable. One commentator has described them thus:

> Among the hypothetical parade of horribles which can be projected is *the scenario in which 50 competing, national, multistate opt-out class actions are brought on the same claims and all members remain silent in response to the fifty notices.* . . . [T]his dilemma of interstate federalism perhaps can only be solved by the United States Supreme Court constitutionally requiring pre-trial opt-in as to non-resident class members who have no minimum contacts with the forum. (emphasis added)

Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3, 81 (1983).[19] Presumably, competing class actions could be resolved only by a race to judgment[20] if neither personal jurisdiction nor opt-in is required. Such competing actions are not uncommon, as *Donovan, supra*, illustrates.[21] In summary, this

19 A requirement of opt-in (as opposed to opt-out) would be the substantial equivalent of a personal jurisdiction requirement, because it would assure that jurisdiction over class members could fairly be exercised.

20 Race to judgment would induce several undesirable kinds of behavior, including "stalking horse" litigation and intentional delay as a means of forum shopping. Furthermore, race to judgment is an unseemly and indeed irrational method of adjudicating controversies of overlapping jurisdiction.

21 See also authority cited in note 15 supra.

Court could not decree binding effect for multistate class actions without creating a number of disadvantageous consequences and without perpetually managing the complex body of federal law it would inevitably invent.

The response of plaintiff Shutts, in this case, to these arguments has uniformly been that Phillips should "pay" and avoid the "worry."[22] There is reasonable and genuine basis for dispute, however, as to both liability and damages. Shutts' arguments have involved the unprecedented abrogation of contractual provisions and the overriding of directly applicable Texas law, and a defendant faced with the demand that it "pay" in such a situation to avoid the "worry" is in a difficult position.[23] Furthermore, Shutts overlooks the need for a principled rule of general application, governing not only this case but all cases, and functioning workably in an interstate federal system.

C. Absent, nonresident class members are in a position analogous to that of defendants in that they may suffer permanent adverse adjudications of their property rights.

The rights of nonresident class members can be appreciated by considering a class action in which defendant prevails and judgement is rendered that claimants take nothing. Class claimants may then be in need of personal jurisdiction principles similar to those protecting defendants, because they face the cutoff of their rights by res adjudicata. Shutts has argued that these concerns lack merit, but plaintiffs have themselves objected to class certification in some cases. For example, the Dalkon

22 See, e.g., Brief of Respondents in Opposition, Phillips Petroleum Co. v. Duckworth, No. 82-461 (U.S. S.Ct. 1983), at 6 (arguing that, "If Phillips were really worried about prospective due process denials to plaintiff class, it could pay the claims and prevent the worry"). This argument misconceives the issue.

23 See note 16 supra.

Shield plaintiffs[24] actually appeared in this Court in *Gillette Company v. Miner*[25] to oppose the plaintiff's argument on the ground that certification, in their case, would benefit the defendant[26] in a way unfair to the class.

Disposing of nonresidents' rights may be appropriate *if* they have intelligently and voluntarily submitted themselves to the jurisdiction of the court, for better or for worse. There are several reasons, however, that such consent cannot be inferred from the mere fact of notice in multistate class actions. First, a court lacking power to compel appearance has no authority to compel a putative class member to opt in or to opt out.[27] Absence of power to compel appearance is logically inconsistent with power to compel a legally binding choice through the compulsory filing of a paper with the court. Secondly, class notices

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24 In re Northern Dist. of Cal. "Dalkon Shield" IUD Products Liab. Litig., 693 F.2d 847 (9th Cir. 1982).

25 Brief of Amicus Curiae on behalf of Plaintiffs in the "Dalkon Shield" IUD Products Liability Litigation, Gillette Company v. Miner, No. 81-1493 (U.S. S. Ct. 1982).

26 A similar argument was made in opposition to certification by plaintiffs in In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982). Dalkon Shield and Skywalk involved mandatory class actions and thus present slightly different issues; in both cases, however, the trial court had found notice and representation sufficient to satisfy due process.

In both mandatory and voluntary class actions, defendants may be free to unfairly influence the choice of forum if multistate class jurisdiction is allowed without nexus or contacts. Such was precisely the complaint of plaintiffs in the Dalkon Shield and Skywalk cases.

27 See Fisch, Notice, Costs, and the Effect of Judgments in Missouri's New Common-Question Class Action, 38 MO. L. REV. 173, 212 (1973); Comment, supra note 2, 69 IOWA L. REV. at 800; Note, Personal Jurisdiction and Multistate Class Actions: The Impact of World-Wide Volkswagen v. Woodson, 32 DRAKE L. REV. 441, 459 n. 133 (1983).

are not comparable in effectiveness to service of process.[28] They are notoriously poorly understood, and they generally prompt the reasonable lay recipient to throw them away because they give the illusion that legal effects can be avoided by inaction. Third, class notices are often written so as to mislead.[29] Finally, restrictions on the right to opt out are imposed in every class action, as they were here,[30] and such restrictions limit the voluntariness of submission.

The Kansas court concluded that these problems were solved by notice and representation. But this conclusion begs the question: why, then, are notice and representation not sufficient to bind a *defendant* who has no contact with the forum? A class can be composed of defendants, too; may a *defendant class* be bound by res judicata upon mere notice, when its members have no affiliating circumstances or nexus with the forum? The Kansas court's reasoning thus supports the cutoff of defendants' rights as well as it does those of plaintiffs.[31] This conclusion is consistent with the hypothesis that nonresident class members are actually in a position analogous to that of defendants in that they may lose their rights involuntarily.

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28 See Miller, Problems in Giving Notice in Class Actions, 58 F.R.D. 313, 322 (1972); Comment, supra note 2, 69 IOWA L. REV. at 800 n. 41.

29 Cf. Aguchak v. Montgomery Ward Co., 520 P.2d 1352, 1356-58 (Alaska 1977) (holding standard-form summons unconstitutional because written so that non-lawyer could not understand his rights with respect to appearance, venue or other procedures). See also Kennedy, Class Actions: The Right to Opt Out, 25 ARIZ. L. REV. 3, 42-44 (1983); Miller, supra note 28, at 322.

30 Every class action, including the present one, necessarily imposes limits on the time and manner of opting out. See Comment, supra note 2, 69 IOWA L. REV. at 800 n. 41.

31 See Kennedy, Class Actions: The Right to Opt Out, 25 ARIZ. L. REV. 3, 38-39 (1983).

Notice and representation are only a part of due process. There are other essential parts, including an appropriate forum, with which notice and representation have nothing to do. Thus it is one thing to say that a class action may proceed without all parties physically present in the courtroom, but it is quite another to say that a forum with which the parties have had no contact may exercise jurisdiction over them.

II. KANSAS' SUBSTITUTION OF ITS OWN LAW FOR THAT OF OTHER STATES WILL LEAD TO "MAGNET" FORUMS FOR CLASS ACTIONS AND TO FRUSTRATION OF THE POLICIES ADOPTED BY OTHER STATES.

The Kansas court avoided some of the conflict of laws questions faced in *Miner v. Gillette Company* by the expedient of countermanding the Constitutions, legislation, and court decisions of Texas and Oklahoma. Kansas made clear that it will apply its own law in derogation of that of a different State even if the interests of the other State are more significant and even if the transaction took place in the other State between citizens of the other State.[32]

As the Kansas court appeared to recognize,[33] this holding creates the danger that resort to "magnet" forums may defeat the chosen substantive policy of other States. If other States were to adopt a similar approach, plaintiffs' attorney would be able in every class action to identify a "best" plaintiffs' forum. This magnet jurisdiction would be the State that would be most likely, among the fifty States of the union, to hold against the

32 Only if it is convinced that reasons to the contrary are "compelling" would Kansas do otherwise. Appendix A43.

33 "[T]his opinion should not be read as an invitation to file nationwide class action suits in Kansas and overburden our court system." Appendix A24.

defendant, or the one that would award maximum damages.[34] Such a forum would ignore laws that would produce a defendant's judgment or a lower recovery. The frustration of the substantive regulatory choices made in the respective regulatory commissions, legislatures, or courts of other States would naturally follow. The effect would be similar to, but more direct, than that condemned by this Court in the famous case of *Erie RR. v. Tompkins.*[35]

In the present case, for example, Texas has strong interests in the relationship between oil and gas producers and royalty owners. This Legal Foundation has appeared in natural gas cases arising from both Texas and Kansas and would respectfully state to the Court that the jurisprudence of the two States differs dramatically. Kansas, in fact, is a maverick jurisdiction in oil and gas matters,[36] probably because a portion of the State produces

34 Ironically, the Kansas court applied Kansas law in part because "[t]he plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." Appendix A43. In this, the court missed the point.

It was no accident that the action was filed in a forum in which the forum's law was adverse to the defendant to the maximum degree. Under these circumstances, it is not surprising that plaintiffs "desired" that law to apply. The question remained whether such application was consistent with the defendant's rights, a question the Kansas Court did not deem necessary to consider. Id. at A42-A43.

35 304 U.S. 64 (1938). The Erie Court emphasized the frustration of state policy resulting from substitution of law preferred by the forum, and it cited Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1932) to that effect. Precisely the same kind of frustration, as well as the same kind of forum shopping and discrimination as were concerns in Erie, would result from the Kansas Court's decision here.

36 For example, Kansas is one of very few jurisdictions that have enacted intrastate price controls lower than those that would be administered by the Federal Energy Regulatory Commission. See Energy Reserves Grou Kansas Power & Light Co., 459 U.S. 400 (1983). Kansas has inte. ted its law together with federal law so as to

oil and gas but a larger and politically more powerful segment does not. Kansas' attitude toward producers has resulted in Kansas Supreme Court decisions that have been attacked by the Federal Energy Regulatory Commission in this Court on federalism grounds.[37]

Interest on suspense royalties is a case in point. The ability to suspend royalty is absolutely essential, since loss of the lease may follow even inadvertent underpayment and since lawful rates are frequently uncertain. The producer is often in the situation in which gas purchasers claim that he is overcharging and royalty owners claim that he is underpaying, and suspension of payment pending determination is the only way to assure against multiple liability. Respondent Shutts, reflecting the Kansas attitude, describes suspension as "wrongful."[38] But to the State of Texas, which protects the right to suspend and would require a non-punitive approach to interest, the Kansas approach seems calculated to discourage production. Furthermore, agreement on interest treatment of suspense royalties is a common and appropriate feature of oil and gas leases, but the Kansas court here nullified such agreements, even if made in Texas by Texas citizens. The Kansas approach amounts to imposition of higher energy costs on each of the other States, favors narrow interests of Kansas citizens, and might be opposed by Texas and Oklahoma as not leading to the best climate for oil and gas production in the long term.

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abrogate agreed pricing terms on gas sold in Kansas. Compare Mesa Petroleum Co. v. Kansas Power & Light Co., 229 Kan. 631, 629 P.2d 190, on rehearing, 230 Kan. 166, 630 P.2d 1129 (1981) with Pennzoil v. FERC, 645 F.2d 360 (5th Cir. 1981) (affirming contrary conclusion by FERC). Other examples are to be found in the Petition for Certiorari.

37 Brief of Federal Energy Regulatory Commission, Mesa Petroleum Co. v. Kansas Power & Light Co., No. 81-711 (U.S.S.Ct. 1981).

38 Brief of Respondents in Opposition, Phillips Petroleum Co. v. Duckworth, 103 S.Ct. 725 (1983) (Shutts II), at 14, citing Shutts v. Phillips Petroleum Co., 222 Kan. 527, 552-53, 567 P.2d 1292 (1977) (Shutts I) (calling the possession of moneys by suspension "wrongful").

Another erroneous reading of Texas law is to be found in the Kansas court's unsupported assumption that limitations would bar these claims in all other forums.[39] On the contrary, Texas has a "savings" statute, which would have the effect of allowing the filing in the proper court of claims dismissed for want of jurisdiction, as though they had been filed as of the time they were filed in Kansas.[40] The Kansas court's summary statement that the claims would be time-barred without analysis of this statute is symptomatic of its disinclination to respect the laws of other States.

The point is not whether Kansas or Texas law is "better" policy. It is that this frustration of other States' policy is an inevitable feature of Kansas' choice of law approach. Furthermore, if the Kansas approach were generally adopted throughout the nation, it would create a magnet forum for every class action.

III. THIS CASE DOES NOT INVOLVE A COMMON FUND, AND THE REASONING OF THE KANSAS COURT WOULD APPLY WITH EQUAL FORCE TO REMOVE JURISDICTIONAL AND CHOICE OF LAW CONCERNS FROM EVERY MULTIPLE CLAIM CASE.

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39 The Kansas court erroneously stated, "if in this action Kansas is without jurisdiction, . . . this action would not toll the statute of limitation in [Texas]." This unsupported statement appears at Appendix A17 and is flatly in contradiction of the Texas Statute. See the following note.

40 Tex. Rev. Civ. Stat. Ann. art. 5539a (Vernon 1974).

It is true that the Texas statute would not "save" claims that were already time-barred when this action was filed, but there is no policy reason against that result. The Texas statute would preserve claims as of the date of filing of this action, contrary to the Kansas court's assertion.

The Kansas court's effort to support its decision by "common fund" reasoning[41] is erroneous and should particularly be rejected by this Court. [42] This action for damages[43] does not in any respect resemble the common fund cases, [44] and indeed the difficulty with the Kansas court's reasoning is that it is equally applicable to every class action.[45] It would authorize a magnet forum to ignore jurisdictional and choice of law concerns in virtually every such case.

CONCLUSION

Both the assumption of class action jurisdiction over nonresidents and the choice of law approach adopted by Kansas should be reversed.

Respectfully submitted,

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41 The Kansas court used this reasoning to support both its jurisdictional conclusions and its choice of Kansas law. Appendix A12, A43.

42 The Kansas Court's reliance on Hansberry v. Lee, 311 U.S. 32 (1940), is misplaced for three reasons. First, the ambiguous reference to those "not within the jurisdiction" is most logically read as referring to those physically outside the state. It is less reasonable to consider this offhand remark as a major break with past jurisdictional concerns. Secondly, the phrase is dictum, because the class members in Hansberry were all residents. Third, Hansberry was decided in another constitutional era, before International Shoe v. Washington, 326 U.S. 310 (1945), and long before Shaffer v. Heitner, 433 U.S. 186 (1977) or Rush v. Savchuk, 444 U.S. 320 (1980).

43 The Kansas court expressly held that the action "is one for damages." Appendix A44. This conclusion would contradict the "common fund" conclusion even if there were no other reasons against it. See note 32 infra.

44 This Court's common fund cases are based on the rationale that if there is an identifiable, exhaustible res, which might be made the subject of inconsistent adjudications, it is appropriate to adjudicate all claims affecting the res in one proceeding, where the res is located. A common fund is like a single fixed pie against which there are claims by persons so related that, if their claims were differently adjudicated, the results would be inconsistent. For example, in Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915), the Court concluded that an insurer's safety fund, made of contributions, was necessarily treated as a unit because "[t]he fund was single . . . . It would have been destructive of [policyholder's] mutual rights to use the mortuary fund in one way . . . in one state, and to use it in another way . . . in another state." Id. at 670-71.

No such situation exists here. There would be no inconsistency if some claimants received one amount and others received whatever other amount, if any, might be due them; in particular, there would be no inconsistency if Texas claimants' claims were adjudicated in Texas under Texas law. There is, further, no reason for supposing that their claims must be paid from a "fund" located in Kansas. Petitioner Phillips' characterization of this reasoning as judicial "alchemy" is justified.

45 The Kansas court's reasoning was based in large part upon the fact that the claims are similar. But common issues are a requisite of every class action. The court buttressed its conclusion by the argument that defendant did not segregate damages in advance in its accounting and that the defendant did business in the State. These conditions too may be expected in virtually every multistate class action.

PETITIONER'S

BRIEF

(10)

No. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Kansas

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a state court in a class action, consistent with basic principles of federalism and the Due Process Clause of the Fourteenth Amendment, can exercise jurisdiction over unnamed class members and their claims when: (1) the class members are nonresidents who have had no contacts with the forum state; (2) the class members have not affirmatively consented to its jurisdiction; (3) the claims arose entirely in other states; and (4) the forum has no significant interest in them?

2. Whether a state court in a nationwide class action, consistent with the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Section 1 of the Constitution, can apply its own law to transactions between nonresidents that occur in other states and to which the forum has no connection?

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BRIEF FOR THE PETITIONER[1]

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (235 Kan. 195, 679 P.2d 1159) is set forth at page A2 of the Appendix. The unpublished order of the District Court of Seaward County, Kansas, is set forth at page A48 of the Appendix.

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[1] Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix to the Petition for Certiorari at page A68. Unless otherwise indicated, all Appendix citations are to the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The opinion of the Supreme Court of Kansas was entered on March 24, 1984. A motion for rehearing was filed before the Supreme Court of Kansas on April 13, 1984 and was denied on May 11, 1984. The Petition for A Writ of Certiorari was timely filed August 9, 1984 and was granted October 9, 1984. This Court's jurisdiction is based on 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Article IV, Section 1 of the United States Constitution provides in pertinent part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State.

The statutory provision involved is Kan. Stat. Ann. § 60-223, which is set forth at page A65 of the Appendix to the Petition.

STATEMENT OF THE CASE

Petitioner, Phillips Petroleum Company (Phillips), a Delaware corporation with its principal place of business in Oklahoma, produced or purchased natural gas from oil and gas leases covering lands located in 11 states. A60-A64. Phillips sold some of the gas to pipeline companies for transportation and resale in interstate commerce at prices regulated by the Federal Power Commission (FPC). Phillips used some of this gas itself to manufacture carbon black, as a chemical feedstock for other products, and disposed of some of the gas in other transactions not involving a sale to a pipeline company.

The contractual arrangements between Phillips and either: (1) the producer from whom it purchased the gas, or (2) the royalty owners under the leases in properties where Phillips was the lessee, varied considerably. Under the most common arrangement, either the purchase price of the gas or the royalty was calculated by reference to the price received by Phillips for gas sold in certain counties in Oklahoma and Texas. When Phillips was a purchaser of gas, Phillips generally contracted with the producer to pay royalties to the royalty owners under the producer's leases with those owners as the producer directed.

Phillips was required to obtain FPC approval of price increases for gas sales, but was permitted to collect the higher prices pending final approval, subject to refund to the purchasing pipeline companies if any part of the price increases was not finally approved. FPC regulation 18 C.F.R. § 154.102(b), required Phillips to file a general undertaking and agreement binding Phillips to return to purchasers amounts collected under disapproved rates with interest at a fluctuating rate determined by reference to Treasury Bill interest rates. After a price increase finally was approved, Phillips would compute and pay royalties based on the higher price for gas produced during the time that Phillips was allowed to sell at that higher price. Payments of additional royalties were made between December 30, 1975 and July 1, 1980 after final resolution of court challenges to FPC Opinions 699, 749, and 770.

When a new rate increase order was promulgated, Phillips would notify royalty owners of the rate proceeding. The notice informed royalty owners that they could receive royalties computed at the higher rate if they agreed to reimburse Phillips for any overpayment of royalties resulting from the denial of all or a portion of the price increases.

In this Kansas state court action, three named royalty owners, for themselves and on behalf of all royalty owners to whom Phillips paid royalties, seek to recover interest on the additional royalties paid by Phillips.[2] One of the named class representatives, Irl Shutts, is a resident of Kansas, and the other two, Robert and Betty Anderson, are residents of Oklahoma. The three named plaintiffs own oil or gas leases in Oklahoma and Texas, but not in Kansas.

Phillips moved to dismiss the unnamed nonresident plaintiff class members and their claims on the ground that the state court could not constitutionally exercise jurisdiction over them. See Answer, Pretrial Motion and Counterclaim, Joint Appendix, p. 9. On May 1, 1982, the trial court denied the motion and certified a nationwide class of approximately 33,000 plaintiffs.[3] Phillips then brought an original mandamus action in the Supreme Court of Kansas. On June 28, 1982, the Supreme Court of Kansas denied the petition without opinion. Phillips unsuccessfully petitioned this Court for certiorari. *Phillips Petroleum Co. v. Duckworth*, 459 U.S. 1103 (1983).

This case was tried in the District Court of Seward County, Kansas on January 27, 1983, and on May 20, 1983, Phillips was held liable to approximately 28,100 class members for interest computed pursuant to Kansas law.[4] The lower court awarded interest to the royalty owners at the rate set by federal regulation applicable to Phillips' obligation to its pipeline purchasers. Phillips

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[2] A copy of the Petition is set forth at page 3 of the Joint Appendix.

[3] The journal entry commemorating this order of the trial court appears at page 17 of the Joint Appendix.

[4] The 33,000 original class members were reduced by approximately 2,400 who elected to opt out, and by approximately 1,500 to whom notice could not be delivered.

appealed and on March 24, 1984, the State Supreme Court affirmed the trial court's exercise of jurisdiction over the entire class, and upheld the application of Kansas law to all the contracts and transactions involved in the case. The court also increased the post-judgment rate of interest from the FPC rate to the higher 15 percent Kansas statutory judgment rate.

The Kansas Supreme Court concluded that jurisdiction was proper over all class members saying that Kansas had a "legitimate interest" in adjudicating the claims because Phillips does business and owns property in Kansas. This "interest" was said to be enhanced because the lawsuit involved the oil and gas industry, an industry that is "significant" in Kansas. The court below also specifically held that jurisdiction was not dependent upon the existence of any contacts between the absent nonresident class members and the forum.

The Kansas Supreme Court decided that Kansas law should be applied to all class actions brought in Kansas, except when "compelling reasons" require the application of another state's law. The application of Kansas law was not thought to depend upon there being any contacts between the class members or their claims, and the forum.

Fewer than 2.7 percent of the class members are residents of Kansas, less than one-quarter of one percent of the involved leases are located in Kansas, and Kansas leases account for only .003 percent of the additional royalties. A9. Yet, the judgment holds Phillips liable under Kansas law to a class consisting of royalty owners residing in all 50 states, the District of Columbia, the Virgin Islands, and several foreign countries.

Other states have far greater interests in this litigation than Kansas. For example, a majority of the leases and a plurality of those people who received additional royalties are located in Texas. A62-A64. Oklahoma, which is Phillips' principal place of business, has the next

largest percentage of both royalty owners and leases. All of the royalty payments and the notices to royalty owners concerning the price increases were sent by mail from Oklahoma.

Of the approximately $11.3 million in additional royalties paid, Texas residents received $4.7 million; Oklahoma residents $1.3 million; Kansas residents only $123,000. Oklahoma, Texas, Louisiana, New Mexico, and Wyoming each have more of the involved leases located within their boundaries than does Kansas, and the additional royalties attributed to the leases in these states are substantially greater than the royalties related to Kansas leases. The tables at A62-A64 show other states with a far greater interest in this litigation than Kansas. By any measure, the "Kansas connection" is truly *de minimis*.

SUMMARY OF ARGUMENT

This Court has never approved the exercise of jurisdiction by a state court over nonresidents who have no "contracts, ties, or relations" with the forum state, and who have not voluntarily appeared in the action. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). *See also Pennoyer v. Neff*, 95 U.S. 714 (1877). Although this Court has not expressly held the Constitution's jurisdiction limitations applicable to nonresident plaintiffs in a class action, the standard must be the same, since there can be no constitutionally significant difference between the extinguishment of a claim of a nonresident plaintiff class member, and the imposition of a liability on, or the extinguishment of a claim of, a nonresident defendant. Prior cases do not justify any other conclusion.

Moreover, the choice of law rule adopted by the court below resulted in 100 percent of the class members' claims being adjudicated by a state that had a legitimate

interest in, at most, only three percent of those claims. The holding encroaches upon Phillips' rights and the nonresident class members' rights under the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Section 1 of the Constitution. The court below arbitrarily applied forum law to thousands of nonresidents and transactions with which Kansas had no "significant contact or significant aggregation of contacts, creating state interests" that constitutionally would permit the use of Kansas law. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

Finally, the decision below represents an unprecedented encroachment by the Kansas judiciary upon the judicial power of other states that interferes with the orderly administration of their laws in a manner inconsistent with the principles of federalism protected by the Due Process and Full Faith and Credit Clauses. The court below totally disregarded each state's sovereign power to try causes in its courts under its own law, a power that has been retained by the several states under the Constitution. Under the jurisdiction and choice of law rules applied by the Kansas Supreme Court, the policies of other states with respect to conduct within their borders will be ignored or incorrectly or inconsistently applied. The result surely will be forum shopping and conflicts of jurisdiction among the states. These interferences with state autonomy and the orderly administration of the laws cannot be justified when no legitimate forum state interest is served thereby.

A uniform jurisdiction standard applicable to both nonresident plaintiff class members and nonresident defendants coupled with meaningful limitations on applying forum law in national class actions must be imposed on state courts to protect the interstate federalism embodied in the Constitution.

ARGUMENT

I. THE ASSERTION OF JURISDICTION OVER NONRESIDENT CLASS MEMBERS BY THE COURT BELOW EXCEEDS THE CONSTITUTIONAL LIMITS ON STATE COURT JURISDICTION ESTABLISHED BY THE CONTROLLING DECISIONS OF THIS COURT.

A. The Court Below Ignored The Constitutional Standard Established By This Court Requiring A Relationship To Exist Between A Forum State And A Nonresident To Support Jurisdiction.

The decisions of this Court require a substantial relationship to exist between a state and any individual over whom its courts seek to assert jurisdiction. To achieve that objective, this Court, in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), adopted a flexible "minimum contacts" standard by which to measure the sufficiency of that relationship. It also expressly stated that the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." 326 U.S. at 319. Since then, this Court always has insisted that the necessary relationship exist. This principle was applied recently in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980), in which this Court stated:

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.

The requirement of a relationship between the forum state and an individual over whom it seeks to assert

jurisdiction is fundamental, as evidenced by several recent cases in which this Court has held state court assertions of jurisdiction over nonresidents unconstitutional because sufficient contacts were absent. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, —— U.S. ——, 104 S. Ct. 1868 (1984); *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. California Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977). Indeed, in *Shaffer v. Heitner*, 433 U.S. at 212, the Court stated:

> We therefore conclude that all assertions of state court jurisdiction must be evaluated according to the standard set forth in *International Shoe* and its progeny.

Notwithstanding this and other clear statements in this Court's decisions, the court below held that the *International Shoe* standards were "inapplicable to nonresident plaintiffs in a class action . . . ." A12. The Kansas court reasoned:

> "Because a class action must necessarily proceed in the absence of almost every class member, we hold the residential makeup of the class membership is not controlling. . . . What is important is that the nonresident plaintiffs be given notice and an opportunity to be heard and that their rights be justly protected by adequate representation. . . . Therefore, while the essential element necessary to establish jurisdiction over nonresident defendants is some 'minimum contacts' between the defendant and the forum state, the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process."

A12, *quoting Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 542-43, 567 P.2d 1292, 1305 (1977), *cert. denied*, 434 U.S. 1068 (1978) (*Shutts I*). In restricting the application of *International Shoe* and the cases building

upon it, the Kansas Supreme Court below has created an unsound and unconstitutional distinction that is not justified by this Court's decisions.

A cause of action "is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). An adverse judgment is no less intrusive upon a plaintiff class member's property interest than any other adverse judgment. A class action judgment has the same *res judicata* effect as an individual judgment denying a claim. When entered, the unnamed plaintiff's claim is extinguished, thereby depriving the class member of property to the same extent as any other adverse judgment. There is no constitutionally significant distinction between the property rights involved in adjudicating a cause of action of a nonappearing nonresident plaintiff and those involved in adjudicating the obligations of a nonappearing nonresident defendant. In either case, the state purports to reach beyond its borders to affect a nonresident's substantial property interests.[5]

A party's designation as plaintiff or defendant often results more from the formal posture of the action than from any inherent difference in the nature of the rights being adjudicated.[6] A declaratory judgment action, for

[5] The Uniform Class Action Act limits jurisdiction over nonresident class members to those instances when jurisdiction in an individual action against the nonresident would be proper and contains an optional provision allowing jurisdiction over nonresidents whose state of residence has approved the assertion of jurisdiction. National Conference of Commissioners on Uniform State Laws, Uniform Class Action [Act] [Rule] § 6. *See* Scher, *Uniform Class Action Act: A Critical View*, 63 A.B.A.J. 840, 842 (1977). Kansas has not adopted the Act, thus it is unavailable for a basis for jurisdiction.

[6] One cannot even assume that the parties identified as plaintiffs voluntarily brought suit to determine their claims. Kansas law, for example, permits making certain unwilling participants involuntary plaintiffs. Kan. Stat. Ann. § 60-219.

instance, may be filed by a party who seeks to establish the nonexistence of a contract claim by the defendant. The same action, with the parties reversed, may be initiated as a breach of contract suit. Thus, formal party designations may reflect only the result of a race to the courthouse. Because the labels "plaintiff" and "defendant" do not necessarily distinguish the underlying interests of the parties, the Constitution's limitations on state court jurisdiction over a nonconsenting nonresident plaintiff claimant must be the same as those applicable to jurisdiction over a nonresident defendant.[7] A state's jurisdiction to deny or foreclose a nonresident's claim should not be subject to lesser constitutional scrutiny than its jurisdiction to impose a liability on a nonresident.

This Court's precedents do not support the creation of a jurisdictional distinction based upon party designation; rather, jurisdictional limitations extend to all parties and protect claims of nonresidents. As recently as *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982), this Court held that due process requirements "protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." In *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916), a Pennsylvania court was not permitted to assert interpleader jurisdiction over a nonappearing nonresident claimant to proceeds of an insurance policy. In *Estin v. Estin*, 334 U.S. 541 (1948), this Court again recognized that an attempt to extinguish a claim of a person beyond the state court's jurisdiction was nothing more than "an attempt to exercise an *in personam* jurisdiction over a person not before the court." 334 U.S. at 549. *See also Hanson v. Denckla*, 357 U.S. 235 (1958) (assertion of jurisdiction over non-

[7] This Court, in other contexts, has analyzed the rights of a plaintiff under the same standards as those governing defendants. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

appearing nonresident trustee who was a mere stakeholder was improper).

The combined effect of Kansas' expansive jurisdiction position and that state's class action statute, which requires an absent class member to take affirmative action to avoid being included in the class, results in a rule that violates the due process interests of the absent class members and is tantamount to jurisdiction over nonresidents by default. Kansas has arrogated to itself the power to compel a nonresident to take affirmative action to avoid its jurisdiction.[8] This Court, however, repeatedly has said that the "unilateral activity of those who claim some relationship with a nonresident" is not constitutionally sufficient to satisfy due process requirements. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, —— U.S. ——, 104 S. Ct. at 1873; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A state that does not have the power to compel a nonresident to submit to its jurisdiction logically cannot have the power to compel that nonresident to take affirmative action to avoid its jurisdiction. It still must be taken as established that "a court cannot conclude all persons interested by the mere assertion of its own power . . . ." *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29 (1917).

The situation in the present case stands in sharp contrast to *Keeton v. Hustler Magazine, Inc.*, —— U.S. ——, 104 S. Ct. 1473 (1984), in which the nonresident plaintiff voluntarily chose a forum in which she suffered damage. As indicated by earlier decisions of this Court, a plaintiff may submit to the jurisdiction of a court voluntarily, by affirmative act.[9] In the present case, however, it cannot be said that the nonresident class members affirmatively chose the forum and, unlike Keeton, those class members did not suffer any damage in Kansas. In this case, as discussed further below, there is absolutely no relationship between Kansas and the nonresident class members.

[8] A nonresident defendant with no contacts with a forum state need take no action to avoid being bound by a judgment. "The defendant would be free to rely upon his defense [of lack of jurisdiction] by letting judgment go by default." *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 30 (1917). Under the Kansas rule a nonresident plaintiff is denied that option. *Cf.* Kennedy, *Class Actions: The Right To Opt Out*, 25 Ariz. L. Rev. 3, 81 (1983).

By reaffirming its opinion in *Shutts I*, the Kansas court suggested that in *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court granted state courts jurisdiction over plaintiffs in class actions, whether or not minimum contacts exists between the absent plaintiff and the forum. That case, however, did not even present an issue of state court jurisdiction because all class members in *Hansberry* appear to have been residents of the forum state, and because the land in question also was in that state. In that case, this Court simply observed in passing that courts sometimes are called upon to proceed with causes in which joinder of all those interested is difficult or impossible because, *inter alia*, "some are not within the jurisdiction." 311 U.S. at 41. This dictum, which has nothing to do with due process requirements, is what the court below relied upon to justify its position. The *Hansberry* statements merely articulate the rationale of the class action device and identify the procedural steps nec-

[9] Once voluntarily before the court, the plaintiff even may be subject to jurisdiction for counterclaims. "The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence." *Adam v. Saenger*, 303 U.S. 59, 67-68 (1937).

essary to adjudicate claims of a class over which the state court has jurisdiction.

This Court's citations in *Hansberry* of *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1914), and cases following *Ibs*, reinforce this conclusion. In *Ibs*, this Court specifically addressed the question of jurisdiction over nonresidents and found an independent basis for jurisdiction to exist before discussing the propriety of the class action procedure. 237 U.S. at 671. In *Christopher v. Brusselback*, 302 U.S. 500 (1938), also cited in *Hansberry*, it was held that personal liabilities of stockholders could be enforced only "in a court having jurisdiction to render a judgment against them *in personam*," 302 U.S. at 502, and that, when no basis for jurisdiction existed, the federal class action procedure provided for by former Equity Rule 38 was inapplicable. 302 U.S. at 505. The citation of these cases in *Hansberry* clearly indicates that this Court had no intention of abandoning the traditional requirements of personal jurisdiction in class actions.[10]

Moreover, *Hansberry* was decided in 1940, five years before *International Shoe* and long before the development of the modern, elaborate, and far reaching class action of the kind employed in this case. Whatever its impact, the *Hansberry* dictum must be read as pertaining to a jurisdiction era controlled by strict notions of "presence" and "consent." Indeed, it must be seen as pertaining to a time when class actions were limited to situations in which class members had a defined community of interest in property or contract. It was wholly

[10] In the subsequent decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Court maintained the distinction between jurisdiction and other procedural steps necessary to bind parties. In *Mullane* the Court addressed the jurisdiction issue separate and apart from the issue of the validity of New York's notice and representation procedure utilized in settling the accounts of a trust in that state having numerous nonresident beneficiaries. 339 U.S. at 311-13.

inappropriate for the Kansas court to read *Hansberry* as authority for departing from the more flexible minimum contacts test of *International Shoe* developed years after the oblique dictum in *Hansberry*, and applying that language to a class action in which the members shared nothing more than, at best, some common questions of fact or law.[11]

The decision below is based on a startling proposition—the "common question" class action, a mere procedural device intended to facilitate joinder of similar but unaffiliated claims, can subvert, by itself, the well established constitutional limitations on state court jurisdiction applicable to claims litigated individually. It was unreasonable for the Kansas court to assume that this Court would have adopted such an unsupportable notion in *Hansberry*, a case in which the nature of the class action was entirely different and the jurisdiction issue was not in any way presented.

Yet, the court below elevated the "common question" class action from a procedural device, designed to facilitate the resolution of similar but unaffiliated claims, to an independent source of jurisdictional power that can bypass the constitutional principles articulated by this Court and operate even when no contacts exist between nonresidents and the forum. Thus, Kansas' adoption of a procedural rule, by a process in which nonresidents cannot participate, was deemed sufficient by itself to subject nonresident class members to the judicial power of that state's courts. A state cannot constitutionally create

[11] Until Federal Rule 23 was amended in 1966, a court could adjudicate common questions in a "spurious" class suit, but that proceeding did not purport to bind class members who chose not to intervene. "When a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in litigation, which might or might not be accepted. It was an invitation and not a command performance." 3B *Moore's Federal Practice Appendix* ¶ 23.10[1]. Accordingly, the issue posed in this case could not have arisen prior to 1966, more than a quarter of a century after *Hansberry*.

or exercise this power simply by enacting a class action rule.

Nor can the result below be upheld because Kansas wants to provide a forum for its citizens and believes the national class action is an efficient mechanism for doing so. A state's interest in securing relief for its citizens cannot outweigh the due process right that protects a defendant from litigation in an improper forum.[12] Moreover, in this case there is no legal barrier to the Kansas class members obtaining full relief in Kansas without the nonresident plaintiff class members. Indeed, Kansas' interest in asserting jurisdiction over the latter group is nonexistent, and its claim of efficiency has an exceedingly hollow ring to it. If a Kansas plaintiff, like Irl Shutts, desires to maximize the size of the class in an action against Phillips, there is no unfairness in requiring him to travel to a forum having a relationship with a larger number of class members.[13] This Court's restrictions on personal jurisdiction over nonresident defendants always have required some plaintiffs to litigate outside their home states.

This Court has refused to sacrifice due process rights on the altar of judicial efficiency. Thus, the "efficiency" of prejudgment replevin statutes could not outweigh the individual rights secured by the Due Process Clause, which

> is not intended to protect efficiency or accommodate all possible interests . . . . "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972), *quoting Stanley v. Illinois*, 405 U.S. 645, 656 (1972). In a similar manner, claims of judicial efficiency cannot defeat the requirement that a nonresident be bound only by a state with which he has minimum contacts.

Upholding the decision below would grant states final and unbridled power to extend the jurisdictional limits of their courts and would vitiate this Court's holdings that focus on the relationship between the conduct of the nonresidents and the forum. It would eliminate the due process requirement that a nonresident's "conduct and connection with the forum state [be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297. If minimum contacts is inapplicable in class actions, then the possibility that any state may entertain a nationwide class action deprives both defendants and potential class members of any "degree of predictability" that would allow them to "structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit." *Id.*

B. There Is No Relationship Between Kansas And The Nonresident Class Members.

The connection among the nonresident class members, Phillips, Kansas, and this litigation consists of nothing other than: (1) Phillips' operation of no more than 15 Kansas leases that represented less than one-quarter of one percent of all the leases and generated less than .003 percent of the additional royalties involved in this litigation; and (2) Phillips' payment of royalties to Kansas

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[12] Even when the defendant has a very limited interest in the outcome of the litigation, a state's interest in providing a forum for one if its citizens cannot justify jurisdiction. *See Rush v. Savchuk*, 444 U.S. 320 (1980). *See also Kulko v. California Superior Court*, 436 U.S. 84 (1978) (state interest in support of resident child not sufficient to outweigh rights of absent parent in child support controversy).

[13] The plaintiff class would have been better served if the Andersons had pursued their original Oklahoma action utilizing that state's "opt in" class action statute, Okla. Stat. Ann. tit. 12, § 14—that would have avoided the jurisdictional issue.

residents who comprised less than three percent of all class members, and who received less than two percent of the additional royalties. The remaining 99.75 percent of the leases involved land located in 10 states other than Kansas. The remaining 97 percent of the royalty owners resided in the 49 states other than Kansas, the District of Columbia, the Virgin Islands, and several foreign countries.

The record compels the conclusion that there is a complete absence of contacts between the nonresident class members and Kansas. Separate contracts govern the relationship between Phillips and the individual royalty owners and the rights under those contracts vary from state to state. Class members who are not residents of Kansas have had no contacts with the leases in Kansas or the payment of additional royalties to Kansas residents. The nonresidents had no reason to believe or foresee that they were establishing any contact with Kansas.[14]

The only "affiliating circumstances" between the forum and the litigation divined by the court below justified the assertion of jurisdiction is Phillips' presence in Kansas. Since Phillips does business in every state, the Kansas court seems to be saying that a class action for interest on additional royalties could be brought against Phillips in any state, and each state would have a legitimate interest in that entire litigation. Phillips' contact, however, provides no basis for connecting either the absent plaintiffs or this litigation to Kansas. An attempt to secure jurisdiction over one party on the basis of another's connection with the forum was labeled "plainly unconstitutional" by this Court in *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

No "affiliating circumstances" can be found in the Kansas court's assertion that "[o]il and gas production

[14] It is conceivable that a small number of nonresident class members may have an interest in one or more of the 15 Kansas leases. The record is silent, however, on this point. At best, these interests are *de minimis*.

is a significant industry in this state." A28. The oil and gas industry is "significant" in each of the states in which Phillips had leases. The Court cannot assume that Texas, Oklahoma, Louisiana, and the other states involved would be willing to cede regulation of their oil and gas sector to Kansas.[15] Moreover, whatever may be the significance of the oil and gas industry to Kansas, it provides no "affiliating circumstances" between Kansas and the thousands of nonresidents swept into this class action—their leases relate to lands in other states.

Nor did the nonresident class members voluntarily appear or otherwise consent to the jurisdiction of Kansas. Although Kan. Stat. Ann. § 60-223 gives parties in certain cases the right to "opt out" and exclude themselves from the litigation, thereby avoiding the binding effect of the judgment, a failure to opt out cannot be considered a manifestation of consent to jurisdiction. More often than not, a failure to respond to a class notice will result from "ignorance, timidity, unfamiliarity with business or legal matters" or mere unconcern. *Cf.* Kaplan, *Continuing Work on the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 398 (1967). Moreover, a failure to opt out cannot bestow jurisdiction on a state court under the guise of "implied consent." "Implied consent" is a legal fiction that is effective to support jurisdiction only when there already are contacts with the forum state "of such a nature as to justify the fiction." *International Shoe Co. v. Washington*, 326 U.S. 310, 318-19 (1945). Simply stated, if a court does not have the power to compel a party to act, a failure to act cannot have any legal, let alone jurisdictional, significance.

[15] In *Rush v. Savchuk*, 444 U.S. at 332-33, the Court noted that a total absence of contacts was determinative notwithstanding the presence of other factors, such as a state's interest in adjudicating the claim.

In fact, the Kansas court's holding does not even rely upon the ability of class members to opt out as a basis for conferring jurisdiction. A18-A19. Presumably, the Kansas Supreme Court would permit a national class action from which a plaintiff cannot opt out, as long as "notice" and "adequate representation" were present.[16]

Applying this Court's analysis in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), the decision of the court below must be reversed because there is "a total absence of those affiliating circumstances that are a necessary predicate to *any* exercise of state court jurisdiction." 444 U.S. at 295 (emphasis added). The nonresident class members "carry on no activity whatsoever" in Kansas. *Id.* "They avail themselves of none of the privileges and benefits" of Kansas law. *Id.* It is inconceivable that the nonresident class members could "reasonably anticipate being haled into court there." 444 U.S. at 297. Nor have these nonresidents "purposefully avail[ed themselves] of the privileges of conducting activities within the forum State," as required by *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In summary, the nonresident class members have had absolutely no "constitutionally cognizable contact with" Kansas. Neither the minimum contacts nor the consent needed to permit state court jurisdiction over nonresidents under the requirements of this Court's precedents over the past 107 years is present. Because of the lack of any "contacts, ties, or relations" with Kansas, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 299, the Kansas Supreme Court's judgment must be reversed.

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[16] Although the Kansas court limits its holding to plaintiff class members, the identity of interests in avoiding litigation in a foreign court shared by a defendant seeking to avoid a liability and a plaintiff seeking to protect a cause of action raises the possibility that the Kansas holding easily could be extended to defendant class actions. Is the extinguishment of a cause of action of a plaintiff class member constitutionally dissimilar from the imposition of a liability on a defendant class member? We submit it is not.

C. The Result Below Cannot Be Justified Under The "Common Fund" Cases.

The Kansas court mistakenly relied upon this Court's "common fund" cases to provide: (1) a basis for its holding that due process requirements were met, notwithstanding the absence of any nexus between the class action and the forum, A13; and (2) a contact between the nonresidents and the litigation justifying jurisdiction in Kansas. A28.[17] But that court's transmutation of this Court's "common fund" cases to cover the present factual situation is sheer alchemy.

There is not and never was any "fund" in Kansas.[18] This case involves nothing but a collection of individual contract claims by property owners related to royalties on

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[17] The "common fund" characterization also was invoked by the court to rationalize the application of Kansas law. See page 29 below.

[18] In *Shutts I* the Kansas court created a fund of monies held by Phillips, but "which never did or could belong to Phillips." 222 Kan. at 560, 567 P.2d at 1316. This supposed "fund" consisted of a portion of the additional proceeds collected by Phillips under the FPC suspense procedures that either would be returned by Phillips to the pipeline purchasers if the rate increase ultimately was denied, or would be paid to the royalty owners if the rate increases ultimately were approved. The Kansas court held that this portion of the additional proceeds constituted a "common fund."

In *Shutts II* no such fund could exist since the evidence showed that Phillips used a large portion of the gas itself and did not collect increased proceeds by selling that gas; therefore, it could not be aggregated into a "fund." The court below imposed the obligation to pay interest on these amounts on the basis of the contractual arrangements between Phillips and royalty owners. A33-A34. In effect, it created a "fund" by aggregating the contract claims of the individual royalty owners.

In both cases, the payment of all additional royalties had been made long before suit was brought. Thus, if anything that could have been called a "fund" ever existed, it certainly had ceased to exist before either lawsuit was filed.

gas production in 11 different states.[19] The nonresidents' claims are not in Kansas, and are not dependent upon Phillips ever having any funds in Kansas to satisfy them. Even if a "fund" could be fabricated by some feat of prestidigitation, the different laws of the various states that govern the contract claims would prevent the "fund" from being "common"; even if one state's law governed, the rights of the class members are not "common" because each still must depend upon individual contractual relationships.

Moreover, the Kansas court failed to recognize that the decisive factor in the "common fund" cases was the significant affiliating circumstances among the defendant, the forum, and the litigation.[20] In the very cases cited by the Kansas court, the initial judgment was rendered by a court in the defendant's state of incorporation, the causes of action arose and were determined by the laws of the forum state, and that state had the most significant interest in the dispute.[21] Indeed, in *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915), this Court explicitly held

[19] This Court has made clear in the analogous context of interpleader that contract claims are personal and require satisfaction of the usual rules of state court jurisdiction. *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916).

[20] In the "common fund" cases, "[n]onresidents had purposefully associated with entities or individuals situated in the forum state or enjoying a unique relationship with it, and there was a legal or practical necessity that any determination of the rights of persons actually before the court be applied uniformly to all others similarly situated." Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718, 725-26 (1979) (footnotes omitted).

[21] *E.g.*, *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915) (judgment erected as bar was decided in defendant's home state, under that state's law, where the fund was maintained). *Accord, Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Supreme Council Royal Arcanum v. Green*, 237 U.S. 531 (1915).

that a "common fund" class action "should be brought in a court of the state where the company was chartered and where the . . . fund was kept." 237 U.S. at 672.[22] The Kansas Supreme Court's approach requires only that a single party having a claim that is alleged to be in common with others be a resident of the forum state. This Court's precedents do not support such a bizarre proposition.

Kansas' extension of its jurisdiction to embrace nonresident claimants to a mythical "fund" supposedly held by Phillips, a nonresident that happens to do business in Kansas, does violence to basic jurisdictional principles. In *Estin v. Estin*, 334 U.S. 541 (1948), this Court stated that "we are aware of no power which the state of domicile of the debtor has to determine the personal rights of the creditor in the intangible" unless the creditor was subject to the jurisdiction of the court. The Court then noted that: "The existence of any such power has been repeatedly denied." 334 U.S. at 548. Kansas has defied that statement.

Compounding its error, the court totally ignored the changes in jurisdictional thinking since the "common fund" cases were decided. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), this Court held that the "quasi-in rem" characterization of a case does not immunize it from minimum contacts requirements when it said: "[A]ll assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 433 U.S. at 212. Conjuring up a *res* from a series of disconnected contract claims and combining it with Phillips' completely unrelated activities in Kansas certainly is not a basis for asserting jurisdiction. *Id.* Through the expedient of using the nomenclature of the "common fund" cases as an exception to

[22] If a "fictional fund" can be engrafted on the *Ibs* tree, the jurisdiction root for this case is either in Delaware or Oklahoma, not in Kansas.

the minimum contacts requirement, and by aggregating individual claims into a "common fund," the Kansas court bypassed every due process safeguard enunciated by this Court since *International Shoe* and resurrected the discredited regime of *Harris v. Balk*, 198 U.S. 215 (1905).

Logically extended, the Kansas court's unbounded approach allows any aggregation of individual personal claims of class members to be transformed into a "common fund." This overreaching "common fund" rationale then acts as an all-embracing justification for asserting state court jurisdiction and applying forum law. This fiction, unless repudiated, will remove class actions from the normal operation of constitutional guarantees. The fiction cannot be supported by this Court's decisions and must be rejected.

II. THE APPLICATION OF KANSAS LAW BY THE COURT BELOW IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE FULL FAITH AND CREDIT CLAUSE OF ARTICLE FOUR, SECTION ONE OF THE CONSTITUTION.

The Kansas court, after holding that no contacts need be present among the nonresidents, their claims, and Kansas in order to entertain a class action went further and held that "the law of the forum should be applied unless compelling reasons exist for applying a different law." A43.[23] One need look no further than this Court's most recent statement on choice of laws to see that the application of Kansas law is repugnant to the Constitution.

> [F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its laws is neither arbitrary nor fundamentally unfair.

Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981). The Kansas court's parochial preference for Kansas law can only be characterized as "irrational and lawless in a properly functioning federal system." von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections On Hague*, 10 Hofstra L. Rev. 35, 49-50 (1981).

This Court need not even re-examine its controversial holding in *Allstate Ins. Co. v. Hague*,[24] to conclude that the choice of law rule adopted below is unconstitutional. In that case, forum law was allowed to apply to an insurance contract to permit recovery by a forum resident for the death of her husband who had worked in the forum for an extended period of time. In this case, there is a fatal total absence of the comparable contacts that would give rise to a proper Kansas interest justifying the application of that state's law to the nonresident class members' claims. More than 97 percent of the claims asserted are made on behalf of class members who are not

[23] Although Phillips argued the applicability of foreign states' laws before the trial court and the Kansas Supreme Court, and demonstrated how the laws of other states led to different results, the court below found that no "compelling reasons" existed to look to the law of any other state. What more compelling showing could be made than to demonstrate, as Phillips did: (1) Prior Kansas cases, including *Shutts I*, adopted a choice of law rule that required examination of foreign states' laws; (2) the transactions are completely unrelated to the forum; and (3) the proper application of the laws of other states leads to different results?

[24] A number of commentators have argued that the contacts in *Allstate Ins. Co.* were insufficient to allow the application of forum law. *See, e.g.*, Brilmayer, *Legitimate Interests In Multistate Problems: As Between State and Federal Law*, 79 Mich. L. Rev. 1315, 1326-30 (1981); Silberman, *Can The State of Minnesota Bind the Nation?: Federal Choice of Law Constraints After Allstate Ins. Co. v. Hague*, 10 Hofstra L. Rev. 103 (1981); von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 Hofstra L. Rev. 35 (1981).

residents of Kansas. Indeed, there is not even a showing that any of these 97 percent work in Kansas or ever have set foot in Kansas.

The *Allstate Ins. Co.* holding cannot be stretched to encompass the application of forum law to the claims of named and unnamed plaintiffs who do not live in Kansas or even move to Kansas, but instead simply initiate suit in Kansas or fail to object to suit in Kansas, possibly "for the purpose of finding a legal climate especially hospitable to [their] claim[s]." 449 U.S. at 319. The present situation does not even rise to the level of the state interests present in *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936), in which a post-occurrence change of residence to the forum was insufficient to permit application of forum state law.

The location of the occurrence giving rise to the cause of action, a fact properly considered in determining choice of law, *Allstate Ins. Co. v. Hague*, 449 U.S. at 314 n.19, also does not support the application of Kansas law to the more than 99 percent of the class members who do not have any interest in the handful of Kansas oil and gas leases involved in this litigation. All payments to class members were made from Oklahoma. No activity took place in Kansas with regard to the nonresident class members.

Moreover, application of Kansas law results in "unfair surprise" and the "frustration of legitimate expectations" of Phillips. 449 U.S. at 318 n.24. The contractual arrangements between a royalty interest owner, the producer of gas, and the gas purchaser necessarily are tied to the state in which the lease is located. Thus, the present case goes far beyond the situation in *Allstate Ins. Co. v. Hague*, 449 U.S. at 318 n.24, in which the contract itself recognized that the forum's law might be applicable because it was an ambulatory insurance contract that offered continental coverage. Moreover, as noted by this

Court, Allstate "was undoubtedly aware that Mr. Hague was a Minnesota [forum state] employee." *Id.*[25]

Thus, with respect to over 97 percent of the claims, nothing even remotely related to the contractual relationship giving rise to the nonresidents' claims ever was done or required to be done in Kansas. *See Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1929). All acts connected with the formation and implementation of the contracts covering non-Kansas leases occurred outside Kansas. *Id.* Similarly, all things regarding their performance were done, and were required to be done outside Kansas. *Id.* Neither Kansas law nor the Kansas courts were involved in these leases for any purpose except when they were invoked by the named class representatives in this suit. *Id.* Under these circumstances, Kansas must be held to be "without power to affect the terms of [the underlying] contracts . . . . Its attempt to impose a greater obligation than that agreed upon . . . violates the guaranty against deprivation of property without due process of law." *Id.*

The Kansas court gave three reasons for applying Kansas law.[26] First, "the forum has a significant legiti-

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[25] In *Allstate Ins. Co.*, this Court noted that Allstate was present in the forum, so "Allstate can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to litigation in which the company is involved." 449 U.S. at 317-18. Phillips is present in Kansas and may have been aware of the Kansas court's tendency to export Kansas law by applying it to transactions unrelated to the forum. As shown in the text, however, there is a world of difference between applying forum state law to thousands of leases involving foreign property and nonresidents and applying it to an accident covered by an insurance policy embracing risks throughout the nation issued to a member of the forum's work force.

[26] This holding was contrary to its position in prior similar cases in which the Kansas court cautioned that "[a] court should also give careful consideration . . . to any possible conflict of laws problems," *Shutts I*, 222 Kan. at 557, 567 P.2d at 1314, and attempted to analyze the law of other states. The present case aban-

mate interest in adjudicating the claims of class members." A43. Second, the "common fund nature of the lawsuit provides an excellent reason to apply a uniform measure of damages to the class as a whole . . . ." *Id.* Third, class members were given notice of the action, and by failing to opt out "plaintiff class members . . . indicated their desire to have this action determined under the laws of Kansas." *Id.*

As discussed earlier, the only "significant legitimate interest" identified by the court below is Phillips' business and property in Kansas. A26.[27] But Phillips' Kansas activities are totally unrelated to the non-Kansas leases entered into with the nonresidents. Accordingly, this supposed Kansas interest cannot translate into a contact between absent class members and the forum that justifies the application of local law to contractual transactions having absolutely no relation to Kansas. Under this rationale, each state's law could be applied to every nonresident class members' claims since Phillips holds assets or does business in every state. That result unquestionably transgresses due process because it is "arbitrary" and "fundamentally unfair." *See* Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 Hofstra L. Rev. 17 (1981).

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dons that position possibly because the court realized the difficulties in analyzing all of the various legal relationships and obligations created by the plethora of contractual arrangements existing in each of the various states in which Phillips had leases. That variousness of transaction is further evidence of the inappropriateness of taking jurisdiction over a class action on a nationwide basis and applying Kansas law.

[27] There is nothing comparable in this case to the forum's interest in *Allstate Ins. Co.* that arose because of Allstate's presence in the forum. As this Court noted, "Allstate's presence in Minnesota gave Minnesota an interest in regulating the company's insurance obligations insofar as they affected both a Minnesota resident and court-appointed representative—respondent—and a longstanding member of Minnesota's work force—Mr. Hague." 449 U.S. at 318.

Nor does the illusory "common fund" justify the application of Kansas law in this case. In the "common fund" cases, the "funds" are "common" in part because they clearly are governed by one state's law.[28] The law applied in those cases was the law of the state that had the most significant relationship to the funds. These cases simply do not provide a basis for exempting from normal choice of law rules, class actions involving contractual transactions entered into by citizens of every state with regard to oil and gas rights in thousands of parcels of land in 11 different states.

Perhaps the most abhorent reason given by the court below for applying Kansas law is its assertion that by failing to opt out, the absent class members have "indicated their desire to have the action determined under the laws of Kansas."[29] This is little more than the mindless application of a fiction in an attempt to justify an absurd result. One consequence of this outrageous holding is obvious: "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistable." *Allstate Ins. Co. v. Hague*, 449 U.S. at 337 (Powell, J., dissenting).

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[28] Several of these cases arose in the context of challenges to assessments of fraternal organizations. The controlling law was the law by which the organization was chartered. (If one law is to be applied here on this basis, it should be that of Delaware.) The necessity of one law controlling these funds stemmed from "the instrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed." *Supreme Council Royal Arcanum v. Green*, 237 U.S. 531, 542 (1915). When the class members' rights stem from a multitude of individual contracts, the rationale for requiring one rule of law is absent.

[29] Apparently, the interest of Phillips in having its contractual rights accorded Full Faith and Credit meant little to the court below.

Thus, the court below granted plaintiffs in a class action the right to choose not only the forum in which to have their claims heard, but also the right to choose the governing law. That was done despite the fact that more than 97 percent of the class members have no contacts with Kansas and more than 99 percent do not have any interest in a Kansas oil or gas lease. The Kansas court has invited nonresident plaintiffs, such as the Andersons, to travel to Kansas to initiate nationwide class actions, and to have not only their claims, which arose outside Kansas, but all other class claims decided under Kansas law. In the past this Court has refused to condone the application of a forum's choice of law rule when it led to such an egregiously "arbitrary" and "fundamentally unfair" result.

The application of Kansas law to every member of the class is pernicious. It means that Phillips, which is incorporated in Delaware and has its principal place of business in Oklahoma, and a citizen of Texas who has leased oil and gas rights in Texas land to Phillips, will have their rights under the lease determined by Kansas law. This will occur simply because a Kansan the Texan never has met, has joined together with two Oklahomans neither has met, to bring a class action in Kansas that purports to embrace the Texan. What conceivable "legitimate" Kansas "state interests" justify this result? And, is it not obvious that the application of Kansas law comes as a complete surprise to both the Texas royalty owner and Phillips? [30]

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[30] The illustration, of course, describes virtually every member of the class in this action. The result below is even more unacceptable as applied to a non-Kansas royalty owner who has a non-Kansas lease with a non-Kansas oil company other than Phillips that has sold the gas to Phillips under an agreement that obliges Phillips to pay the royalty owner. Many of the class members in this case are in exactly that situation, because, as noted in the statement of facts, see page 3 above, Phillips is both a producer and a purchaser of gas.

An example of the arbitrary and fundamentally unfair impact that the application of Kansas law had on the issue of the liability *vel non* of Phillips can be seen by an examination of certain contracts between Phillips as gas purchaser and the producers of gas as sellers. As purchaser, Phillips contracted to pay royalties as the producer "shall from time to time direct." The royalty obligation is determined by the terms of the lease agreement between the producer (not Phillips) and the royalty owner. Typically, a lease obligates the producer to pay a portion of the proceeds from the sale of the gas to the royalty owner. Under this arrangement, there is no direct contract between Phillips and the royalty owners.

Four hundred eighty-three of the gas purchase contracts between Phillips and gas producers entered into in other states address the issue of Phillips' liability for interest. R.V. II Transcript 1-27-83, pp. 49-50. These contracts explicitly preclude any liability for interest on amounts paid following government rate increases. Contract excerpt at A37. The royalty owners under these contracts have no contractual relationship with Phillips that would obligate Phillips to pay interest under Texas law. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (1978); *Phillips Petroleum Co. v. Adams*, 513 F.2d 355, 361-62 (5th Cir. 1975) (royalty owner has no greater rights than gas producer). The court below, however, applied Kansas law, and without identifying the source of the royalty owner's entitlement to interest, held that the right to interest could not be avoided by the contract between Phillips and the producer, relying on *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326 (1977), *cert. denied*, 434 U.S. 1065 (1978). Not only does Texas law give no support to the extra-contractual obligation created by Kansas, but Texas also does not even follow the *Maddox* rule. *Exxon Corp. v. Middleton*, 613 S.W.2d 240 (Tex. 1981). The application of Kansas law to these gas purchase contracts, which

have nothing to do with Kansas, creates a liability that Phillips expressly and contractually sought to avoid.

The court below not only created an obligation for interest that stems from an unidentifiable source (and one that cannot be contractually avoided), but it also ensured that the obligation was at the highest possible rate. It accomplished the latter result by transmogrifying Phillips' obligation to make refunds with interest *to pipeline purchasers* with regard to gas *sold*, into an "agreement" to pay *royalty owners* interest at the FPC prescribed rates on gas *purchased* by Phillips.[31] No other state ever has hinted that the federal regulation, promulgated for an unrelated purpose, could have such far reaching applications. If the Kansas law is upheld, all natural gas producers and purchasers will have to conform every transaction in each state with these Kansas obligations. This is totally offensive in a federal system. Kansas cannot be permitted to usurp the ability of every other state to make decisions with regard to transactions that occur within their borders or to oil and gas from beneath the surface of their land.

By imposing Kansas law on all members of the class, Kansas not only has rewritten the obligations of Phil-

[31] In order to circumvent the application of state statutes prescribing a legal rate of interest, the Kansas Supreme Court created a fiction that transformed Phillips' corporate undertaking filed with the FPC pursuant to 18 C.F.R. § 154.102(b) into a promise to pay royalty owners interest at the "FPC rate." Other states would not adopt this ill-founded position for four basic reasons. First, there is nothing in the federal regulation or in the orders promulgating it, that even suggests an intent to benefit third-party royalty owners when refunds are not required. Second, nothing in the corporate undertaking filed by Phillips, R.V. I, p. 202, creates an obligation to pay any money, or any interest at any rate, to royalty owners. Third, much of the gas involved in this case was not even sold subject to refund under the regulation. Fourth, Phillips was the *purchaser* of much of the gas and not the *seller*, and Phillips' corporate undertaking is totally unrelated to these purchase transactions.

lips under non-Kansas contracts, but it also has failed to give effect to substantive defenses recognized by other states,[32] overridden legislated policies found in state statutes,[33] and in one case ignored a state Constitution.[34] Kansas cavalierly has imposed its own unique notions of contract and oil and gas law on all the non-Kansas contracts involved in this action. Had Kansas applied Texas law as stated by the Texas Supreme Court in *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (1978), Phillips would not be liable to certain royalty owners with whom it had no direct contractual connection, and its liability to all others would be less than one-half the amount resulting from the imposition of a higher interest rate by the court below.

The Constitution prohibits the legal imperialism inherent in the decision below. "Full faith and credit does not here enable one state to legislate for tne other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 504-05 (1938). *See also Hartford Accident & Indemnity Co. v. Delta*

[32] For example, in Texas if the interest obligation is based on an equity theory, an offer to pay additional royalties conditioned on the royalty owner entering into an indemnity agreement terminates liability for further interest. *Phillips Petroleum Co. v. Riverview Gas Compression Co.*, 409 F. Supp. 486 (N.D. Tex. 1976). Under Kansas law, an offer does not terminate liability. *Shutts I*, 222 Kan. at 566, 567 P.2d at 1320.

[33] For example, Okla. Stat. Ann. tit. 23, § 8 (1951) provides: "Accepting payment of the whole principal, as such, waives all claims to interest." Kansas avoided this statute by engrafting an exception California had recognized to a similar California statute. *Shutts I*, 222 Kan. at 568, 567 P.2d at 1292. There is no indication that Oklahoma courts would recognize this exception.

[34] The Constitution of Oklahoma prescribes an interest rate of six percent that may be applicable to cases like this one. Okla. Const. Art. XIV, § 2.

& Pine Land Co., 292 U.S. 143, 149-50 (1934). The ability of Kansas, or any state, to impress its legal doctrine on wholly foreign transactions destroys the stability of commercial transactions. The scope of class actions tremendously increases the scale upon which contract rights, settled interests, and legitimate expectations are shattered.[35] Class actions simply cannot be exempted from the limitations on choice of law rules without creating a "substantial threat to our constitutional system of cooperative federalism." *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979).

The fact that the Kansas court utilized interest rate regulations established by the federal government for entirely different purposes as a guide to the award of prejudgment interest cannot give the holding below any additional validity. Allowing a state court to formulate and apply its own "national" rule is a curious and unacceptable reverse image of the days when federal courts applied their own concepts of general law in diversity suits. Upholding the choice of law rule adopted by the court below resurrects many of the problems that existed then. Like the practice struck down in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the holding below is contrary to the Constitution

> "which recognizes and preserves the autonomy and independence of the States,—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any inference with either, except as thus permitted, is an

[35] The impact on Allstate of it having to pay a claim to Mrs. Hague, should be compared to the impact on Phillips of its having to pay over 28,000 claimants under Kansas law, and the additional impact of having to conform with Kansas law in all other aspects of the relationship between Phillips and every one of its royalty payees.

> invasion of the authority of the State and, to that extent, a denial of its independence."

304 U.S. at 78-79, *quoting*, *Baltimore & O.R. Co. v. Baugh*, 149 U.S. 368, 401 (1892) (Field, J., dissenting).

The Kansas court's holdings on jurisdiction and conflict of laws create an intolerable situation in which Kansas can adjudicate a nationwide class action and apply Kansas law without any contacts among the dispute, the parties, and the state. Under Kansas' unique approach to choice of law, the mere institution of a class action in Kansas provides the foundation for applying Kansas law. It is impossible to imagine what type of a showing of rights guaranteed a defendant or nonresident class members by other states would convince Kansas to apply another state's substantive law.

If the integrity of the contractual relationships between Phillips and property owners in the 10 states other than Kansas are to be protected by the Due Process and Full Faith and Credit Clauses, Kansas' arbitrary approach cannot be approved and the decision below must be reversed. States must have a principled basis for applying their own law. This is particularly important because the implications of what Kansas has done go far beyond this action. Since what is good for the goose is good for the gander, other states may choose to follow the lead of Kansas with regard to nationwide class actions in a variety of substantive contexts. This problem is not limited to oil and gas lease matters, as is illustrated by the assertion of jurisdiction by Illinois over a nationwide consumer class action in *Miner v. Gillette Co.*, 87 Ill. 247, 428 N.E.2d 478 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*, 459 U.S. 86 (1982).

Only this Court can assure Phillips, other defendants, and nonresident class members that the rights guaranteed by the laws of the state in which a contract is entered into, or property is located, or a tort occurs, will be respected in Kansas. State courts must be prevented

from indiscriminately imposing forum law on thousands of transactions and countless nonresidents through the expedient of declaring a nationwide class action premised on nothing more than a common question of law or fact when that state has absolutely no legitimate interest at stake.

III. THE DUE PROCESS AND THE FULL FAITH AND CREDIT CLAUSES, ACTING TO PROTECT PRINCIPLES OF INTERSTATE FEDERALISM AND THE ORDERLY ADMINISTRATION OF LAWS, PROHIBIT KANSAS FROM ASSERTING JURISDICTION OVER NONRESIDENT CLASS MEMBERS AND APPLYING KANSAS LAW IN THIS CASE.

This Court always has recognized that constitutional limitations on state court jurisdiction and choice of law are designed in part to preserve the sovereignty of the several states in our federal system. For example, this Court has said that the limitation on state court jurisdiction imposed by the minimum contacts requirement "reflects an element of federalism and the character of state sovereignty vis-a-vis other states." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).[36] As stated in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980):

> [*W*]*e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.* The economic interdependence of the States was foreseen and desired by the Framers. . . . But the

[36] Although personal jurisdiction requirements generally can be viewed only as a function of individual liberties protected by the Due Process Clause, the enforceability of the resulting judgment against unnamed, nonresident class members raises distinct federalism concerns, both as they relate to the individual liberty interests, and as they arise from the Full Faith and Credit Clause.

> Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. *The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States*—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.
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> . . . .
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> Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S. at 319. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state; even if the forum state has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation, *the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.*

(Emphasis added.)

And in the choice of law environment, this Court has insisted that before a state constitutionally may select its own law, "that state must have a significant contact or sufficient aggregation of contacts, creating state interests . . . ." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981). The reason, according to the dissenting Justices in the same case, is that "[b]oth the Due Process and Full Faith and Credit Clauses ensure that the States do not 'reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.'" *Id.* at 337, *quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 292.

Thus, the constitutional limitations on state court power are designed to prevent one state from reaching beyond its borders to interfere in the relationships between other states and their citizens, which is precisely what Kansas has done in this case. Respecting the right of states to exercise their "sovereign power to try causes in their courts" and to apply their own law ensures the availability of local forums for the resolution of disputes, promotes the development by each state of a body of law best adapted to serve the needs of its citizens, and puts the courts under the political control of those whom their decisions affect. The intent of the Framers regarding these fundamental principles cannot be ignored merely to further supposed interests of a particular state, special groups, or undemonstrated economies of judicial administration. As stated in *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 509 (4th Cir. 1956):

> If one State may . . . extend the authority of its courts beyond its boundaries over persons and situations not sufficiently related to that State, the separate identity of the States will be reduced to a mere fiction. Individual States could undertake at the expense of other States to enlarge the sphere of their authority to nationwide dimensions. It requires no flight of fancy to foresee the resulting maze of lawsuits adjudicating the interests of persons having only the faintest and most remote links with the State exercising authority. If the due process clause is not effective to restrain such extensions of local power, then the federal system is likely to be transformed into something very different from anything we have known.

The Kansas Supreme Court erred because it failed to appreciate or even recognize the sovereignty and judicial power of the other states preserved by the Constitution. Its sole emphasis on notice and representation as the foundation of state court power and its insistence on applying Kansas law to transactions and people in which

it has absolutely no interest, renders state lines meaningless. An exercise of state court authority that takes no account whatsoever of the situs of the subject matter of the dispute, the citizenship or residence or even location of the parties, or the relationship between their conduct or the matters to be adjudicated and the forum state, cannot be squared with the principles of our federal system. It must be rejected.

What the Kansas Supreme Court has done in this case shows the grave threat posed to the federal system by unconstrained state court assertions of jurisdiction and applications of forum law in the national class action context. Given the exponential growth in cases of this type in recent years, this Court must establish effective limitations under the Due Process and Full Faith and Credit Clauses on state power. Otherwise, the deleterious side effects of national class actions will do irreparable damage to federalism.

A. The Decision Below Will Lead To Forum Shopping.

If a class action may be brought in any state and local law applied, whether or not the action has any relationship to that forum, plaintiff's counsel will choose a state likely to be receptive to his or her client's claim. "Magnet" states may develop that will resolve, on a nationwide basis, issues concerning consumer protection, products liability, environmental concerns, or the relationship between a gas producer or purchaser and royalty owners. Thus, one would expect a state like Kansas, which has exhibited a receptive and liberal attitude toward class actions on behalf of royalty owners, to be asked repeatedly to adjudicate claims made on their behalf. This already has proven to be the case. There are reported decisions in at least eight Kansas class actions similar to the present one, and its courts have entertained

others.[37] No other state has a reported decision involving a class action seeking interest on additional royalties.[38]

If the approach taken below is tolerated by this Court, other "magnet" forums for other "important issues" are likely to arise. Out of a prudent regard for their self-defense, potential targets will file declaratory judgment actions in "friendly" forums. The result will be unseemly races to courthouses or to judgment.

B. The Decision Below Will Cause The Laws Of Other States Not To Be Applied, Or To Be Improperly Applied.

The decision below demonstrates that there is a substantial likelihood that the forum state will reach results in adjudicating claims before it that conflict with those that would be obtained in far more interested states. Because the results of these class actions purport to operate on a nationwide basis, they will nullify the policies of those other states on a massive scale.

Interstate federalism strives to protect each state's inherent right to adjudge liabilities according to social and economic policies enunciated by a state's governmental branches, pursuant to procedural rules adminis-

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[37] Kansas has granted classes of royalty owners relief in other contexts, such as actions to recover royalties based not upon what the producer received when the gas was sold, but rather upon some current "market value" for that gas. *E.g., Matzen v. Cities Service Oil Co.*, 233 Kan. 846, 667 P.2d 337 (1983). These holdings are contrary to those in other states.

[38] The only class actions that have been brought against Phillips outside Kansas to collect interest on additional royalties were brought in Oklahoma and both were dismissed. The first was brought by Bill Ginder, the senior partner of Ed Moore, one of the plaintiff's counsel. That case was dismissed. The second was immediately brought by Robert and Betty Anderson, respondents herein, also in Oklahoma. They dismissed that lawsuit when they joined Irl Shutts as plaintiffs in the present case.

tered by a state's own administrative or judicial tribunals, and subject to penalties and forfeitures established by representative governing bodies. In creating this environment, each state presumably weighs the economic and social benefits of encouraging corporate or individual activity against the costs or disadvantages to its people. Each state thus generates policies designed to strike a balance between competing goals to achieve the best result for all its citizens. The array of policy choices made reflects the regional, economic, and social diversity present in our nation. These policy decisions ultimately are subject to approval or change by resident voters in each state. If the decision below is permitted to stand, each state, in significant areas of sovereign activity, would effectively make those value judgments on behalf of every other state, but without the system of checks and balances that now exist.

There simply is no reason to believe that states will decide questions of law affecting the claims of nonresident members in the same way as would the courts of states having a meaningful relationship with those class members.[39] As this case graphically illustrates, many courts, which already have wide latitude in choosing the governing law under *Allstate Ins. Co.*, undoubtedly will arrogate to themselves infinitely more authority to do so and probably will not even attempt to apply the law of other interested states. Therefore, adherence to the minimum contacts limitations on state court jurisdiction in the class action context is essential to provide a barrier against the type of parochial applications of forum law that occurred in this case. A42-A43.

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[39] The inherent incentive to forum shop suggests that disinterested states might well be chosen by class representatives in some instances because they would not follow the view of a more interested state.

Even if the forum state attempts to divide a class and apply the state law appropriate to each subclass, it is unrealistic to expect those laws to be determined correctly.[40] A court cannot easily perceive the subtle nuances of the law and policies of another state. For example, only Kansas and Texas have reported cases requiring interest on additional royalties. Whether other states even recognize a claim for interest is uncertain.[41] As this Court has recognized, the determination of unsettled state law is a very difficult task. *See, e.g., Moor v. County of Alameda*, 411 U.S. 693, 715-16 (1973); *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 499 (1941). This especially is true when the subject of the inquiry is highly local in character, such as property or oil and gas law. State courts may well be unwilling to struggle with deciding an uncertain issue on the basis of another state's laws and either will tend to impose their own conception of "good" policy or merely assume that other states follow the forum's policies. A state court hearing a nationwide class action in all likelihood will apply local rules of evidence, statutes of limitations, or other procedural law that, in themselves, could frustrate policies of other states.[42]

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[40] In *Shutts I*, for example, the Kansas Supreme Court construed Texas law as allowing recovery of rates of interest determined by federal regulation. 222 Kan. at 563-64, 567 P.2d at 1318-19. This construction of Texas law subsequently proved incorrect when the Texas Supreme Court limited interest to the Texas statutory rate. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978).

[41] In *Boutte v. Chevron Oil Co.*, 316 F. Supp. 524 (E.D. La. 1970), *aff'd per curiam*, 442 F.2d 1337 (5th Cir. 1971), the court, in dictum, suggested that there might be an allowance of interest on suspended royalties. This dictum appears to conflict with other Louisiana cases concerning interest. *See Frankel v. Bellamore*, 176 La. 1001, 147 So. 59, 60 (1933).

[42] The Court in *Keeton v. Hustler Magazine, Inc.*, —— U.S. ——, 104 S. Ct. 1473 (1984), noted the "considerable academic criticism of the rule that permits a forum state to apply its own statute of limitations regardless of the significance of contacts between the forum state and the litigation." The Court, however, did not determine "whether any arguable unfairness rises to the level of a due process violation." 104 S. Ct. at 1480 n.10.

Admittedly, state courts always have been assumed competent to apply the law of another state when adjudicating transitory causes of action. But the contemporary national class action obliges state courts to undertake the task on an unprecedented scale, casting serious doubt on their willingness and capacity to do it, unless this Court imposes meaningful constitutional limitations on applying forum law.

The decision below demonstrates how easily the policies of numerous states can be ignored, even as to transactions occurring within those states, by a forum entertaining a nationwide class action. For example, Kansas has undertaken to decide the property rights of over 9,500 Texas citizens, most likely with regard to oil and gas produced in Texas. The Kansas Supreme Court did not even consult Texas law. Even if it had, there simply is no assurance that the Texas policies would be honored. Interstate federalism's attempt to protect each state's ability to formulate and enforce its own policies clearly is frustrated by the decision below. Encroachments on state sovereignity must be minimized by limiting jurisdiction in class actions to forums that have legitimate "contracts, ties, or relations" with the events giving rise to the claims and the parties to the actions.

C. The Decision Below Will Lead To Jurisdictional Conflicts Among The States.

The broad and unprecedented assertion of jurisdiction and application of forum law by the Kansas court also interferes with the administration of justice in the courts of every other state by substantially increasing the pos-

sibility of conflicts among those courts.[43] Eliminating any jurisdictional limitations on state court class actions will mean that all 50 states simultaneously can entertain class actions on behalf of the same nationwide class. It is inevitable that in many instances the same action will be brought in more than one state, encouraging races to the courthouse by the lawyers who specialize in these actions. If every state is permitted to entertain nationwide class actions and apply its own law, there will be no efficient mechanism for resolving the resulting conflicts. This Court must apply the Constitution in a way that will prevent these unseemly collisions.

D. There Is No Justification For Permitting The Interference With The Orderly Administration Of Laws That Results From The Decision Below.

Intrusions on the judicial power of one state by another might be tolerable when necessary to protect an important forum state interest. That is not the case, however, in the present situation in which a state court seeks to adjudicate, under its own law, the claims of nonresidents that arose beyond the boundaries of the forum, and in which the forum state possesses absolutely no interest. The court below claimed that judicial economy will result from its entertaining this class action. It tried to buttress its conclusion by mischaracterizing Phillips' minimum contacts argument as advocating a requirement of individual actions or multiple class actions in all 50 states. Phillips is not arguing that class actions be restricted to residents of the forum state. Class actions may include nonresident class members who have minimum contacts with the forum so that it is fair to litigate their claims in that state. The Kansas court erroneously

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[43] For example, conflicting nationwide, diversity-based class actions involving products liability are pending. *See Jones v. Medtronic, Inc.*, Case No. CV-84-L-24555 (N.D. Ala.), and *Linkous v. Medtronic, Inc.*, Case No. 84-1909 (E.D. Pa.).

has assumed that the alternative to this single nationwide class action in Kansas is a class action in each state. The correct alternative is one or more class actions in the state or states that have a constitutionally sufficient relationship with all or a significant number of class members.

In the present case, Oklahoma appears to be such a proper forum to bind all plaintiffs, since each class member had contact with that state and all additional royalties were disbursed from that state. These contacts with Oklahoma, coupled with the interest Oklahoma has in regulating a company with its principal place of business in Bartlesville, might well make it fair to litigate all claims in Oklahoma. The judicial efficiency sought by the court below is not lost if the entire case is litigated in an interested forum.

Kansas' assertion of jurisdiction and application of its own law to adjudicate claims relating to thousands of transactions and nonresidents, with which it has absolutely no relation, was accomplished at the expense of the policies and sovereignty of every other state in the Union. The decision below provides ample proof that invoking cliches about the efficiency and representational character of the class action will produce results that are antithetical to our federal system. Unless this Court insists that its announced jurisdiction principles are adhered to and meaningful choice of law limitations are imposed, state courts inevitably will run riot with the national class action and balkanize numerous areas of substantive law. Our federalism encourages the states to be laboratories to "try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). That design will be totally thwarted if states can use the national class action procedure to extend their jurisdictional reach and apply their

own law to impose their "experiments" on every other state. The need to oppose principles of restraint is obvious.

CONCLUSION

For the reasons stated, the judgment of the Kansas Supreme Court should be reversed. The case should be remanded with directions to dismiss the claims of nonresident class members.

Respectfully submitted,

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No. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

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QUESTIONS PRESENTED

1. Whether a defendant has standing in this Court to raise the due process rights of absent plaintiff class members as a basis for reversing a state court judgment in favor of those class members.

2. Whether the Due Process Clause prohibits a state court from exercising personal jurisdiction over nonresident plaintiff class members to whom the court provides: (1) adequate representation through the named plaintiffs and their attorneys; (2) first class mail notice describing the action; (3) the right to participate; and (4) the right to opt out.

3. Whether the Due Process and Full Faith and Credit Clauses prohibit a state court from applying basic principles of restitution embodied in that State's law to a nationwide class where the dispute arose as a by-product of federal administrative rate regulation, the measure of damages employed was established by the defendant's own actions taken in response to that regulatory process, and there has been no showing of a relevant conflict with any other State's law.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case arose because of the way in which the federal government regulates gas prices, and the effect of that regulatory process on the rights of royalty owners. During the time in question, the Federal Power Commission ("FPC") (now the Federal Energy Regulatory Commission) was authorized to engage in retroactive rate approval. A regulated company, such as the peti-

tioner in this case, was allowed to charge unapproved prices for its gas, subject to a written undertaking with the FPC to refund any excess to purchasers, along with a prescribed rate of interest, if those prices were not ultimately approved. *See* 18 CFR § 154.102. This regulatory process did not directly control the rights of royalty owners, however, even though they were clearly affected by its operation since all royalty payments were based on FPC-approved gas prices. Pet. App. 33.

The three FPC proceedings that led to this case involved reviews of nationwide rates being charged by petitioner Phillips in the mid-1970's. While these reviews were taking place, Phillips "suspended" a portion of the payments to royalty owners on the ground that the unapproved part of its rates might later be subject to recoupment. In each instance, however, Phillips agreed to pay the full royalty, based on the unapproved rate, if the royalty owner provided a bank letter or corporate indemnity guaranteeing repayment plus interest at the FPC prescribed rates if the full gas price was not subsequently approved. Pet. App. 51. *See also Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, 1299 (1977), *cert. denied*, 434 U.S. 1068 (1978) (*"Shutts I"*). A very small percentage of royalty owners provided such an indemnity and thereafter received full royalty payments in a timely fashion. Pet. App. 51.

The remaining royalty owners received no royalty on the unapproved portion of the rates until the FPC rulings on those rates became final. The three rate proceedings at issue here ultimately led to the payment of "suspense royalties" of $3.7 million in July 1976, $4.7 million in July 1977, and $2.9 million in February 1978. Pet. App. 50. Although Phillips had the use of this $11.3 million for several years, it refused to pay royalty owners any interest whatsoever when it finally paid the royalties.

The instant suit was filed in July 1979 by one royalty owner in Kansas and two in Oklahoma seeking to represent a class of royalty owners and gas producers who had received suspense payments without interest from Phillips. J.A. 4. The trial court limited the class to royalty owners, however, finding that the producers' claims raised separate issues. J.A. 17-19. The number of potential class members was approximately 33,000 people, who resided in every state in the country. Pet. App. 49. While the amount allegedly due each class member varied, the average claim was for interest on about $340 (amounting to less than $100), which the trial court found to be "too small to enable each to file a separate action." J.A. 18.[1]

Pursuant to order of the trial court, every potential class member was sent a notice by first class mail, paid for by plaintiffs, describing the action and advising the class member that he could appear in person or by counsel, and that he could opt out of the case by signing and returning the "request for exclusion" that was included with the notice. J.A. 20-22. The final class as certified contained 28,100 members; 3,400 people had opted out and notice could not be delivered to another 1,500 people. Pet. App. 50. Close to 1,000 class members resided in Kansas and a small undetermined additional number owned leaseholds in that State.

After a trial based essentially on undisputed facts, the court concluded that under established precedent in Kansas, including a decision by the Kansas Supreme Court in a virtually identical case involving areawide rate proceedings, *see Shutts I*, the royalty owners were owed interest on the suspense royalties from the date Phillips received the payments until the full royalties and

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[1] Phillips sought to mandamus the trial court to exclude all nonresident class members from the action. The Kansas Supreme Court denied the petition without opinion on June 28, 1982, and this Court denied certiorari. *Phillips Petroleum Co.* v. *Duckworth*, 459 U.S. 1103 (1983).

interest were paid. The rate of interest was set at precisely the rate provided for in the federal regulations—*i.e.*, the rate that Phillips would have had to pay purchasers on refunds and the rate Phillips had demanded in the indemnity agreements from royalty owners.[2]

The Kansas Supreme Court affirmed, except that it applied the 15% Kansas statutory interest rate, rather than the FPC rates, to post-judgment interest. The court rejected Phillips' claim regarding the application of the "minimum contacts" rule of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), as a basis for asserting personal jurisdiction over nonresident class members. It held instead that procedural due process—assured by the Kansas class action statute, which was modelled on Federal Rule 23—provided a sufficient constitutional predicate for this purpose. The court also noted that no other action had been brought on these claims, and that the statute of limitations had run in other States. Pet. App. 17.

The court then found Phillips' efforts to differentiate among various royalty owners—on the basis of such factors as whether Phillips sold the gas or used it, or whether Phillips had agreements regarding interest with producers that it purchased from—to be unavailing. It pointed out that every class member's royalty payments were tied directly to the FPC-approved gas rates, and that "[a]ll suspense monies were withheld and paid out to all royalty owners on a uniform basis. All royalty owners were notified of the right to receive the additional royalties during the suspension period if an acceptable indemnity was filed with Phillips." Pet. App. 41.

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[2] As provided in the federal regulations, the rate varied over time depending on bank prime rates. The specific rates are set out at Pet. App. 54.

The Kansas Supreme Court next addressed Phillips' argument that it should look to the law of each of the eleven states in which the underlying leaseholds were located to determine the interest due on the suspended royalties. Pet. App. 43. The court also rejected this claim, ruling that the FPC interest rates were a proper measure of damages in the circumstances presented. Relying on the equitable principles set out in its earlier opinion in *Shutts I*, the court said that it saw no reason not to adhere to those principles in this case. It also concluded that "[t]he common fund nature of the lawsuit provides an excellent reason to apply a uniform measure of damages to the class as a whole, as each member of the class has been similarly deprived of the rightful use of his or her money." Pet. App. 43.

SUMMARY OF ARGUMENT

I. Phillips lacks standing to argue that the Kansas courts did not obtain personal jurisdiction over nonresident class members. That claim rests solely on the due process rights of those absent class members. *See Insurance Corp. of Ireland* v. *Compagnie Des Bauxites de Guinee*, 456 U.S. 694 (1982); *Keeton* v. *Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984). The established rule is that a party may not assert rights belonging to others except in narrow circumstances not present here. *See Singleton* v. *Wulff*, 428 U.S. 106 (1976). In no instance has this Court allowed a party to raise the rights of its adversary in an effort to undermine his adversary's interests. This case provides no justification for departing from the established rule.

II. The "minimum contacts" requirement, developed for determining when a nonresident defendant can be haled into a faraway court and forced to defend himself or fail to do so at his peril, *see International Shoe Co.* v. *Washington, supra*, is an inappropriate constitutional standard for testing the assertion of jurisdiction over

nonresident class action plaintiffs. The basic distinctions between nonresident plaintiff class members and nonresident defendants amply justify different approaches to personal jurisdiction. *See, e.g., Hansberry* v. *Lee*, 311 U.S. 32 (1940). The process afforded class members by Kansas included an assurance of adequate representation, *see id.*, first class mail notice, *see Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974), the right to appear personally or by counsel, and the right to opt out. Due process requires no more.

Petitioner itself acknowledges that an "opt-in" class action procedure would be constitutionally adequate. Br. at 16 n.13. The essential jurisdictional dispute in this case thus reduces to the difference between an opt-out and opt-in requirement. In our view, the opt-out approach—which was specifically adopted under the Federal Rules, Rule 23(b)(3), (c)(2)(A)—is constitutionally preferable: it allows small claimants to remain in without requiring them to contact an attorney or take other actions before they execute an opt-in agreement; at the same time, it protects larger claimants who either have counsel or have a sufficient amount at stake to assure that they will take proper steps to decide whether it is in their interest to opt out and proceed on their own.

III. The application of basic equitable principles of restitution to the facts of the instant case violated no constitutional proscription concerning choice of law. The measure of damages authorized by the court below, while premised on Kansas law, can hardly be said to be "arbitrary or fundamentally unfair" in any constitutional sense. *See Allstate Insurance Co.* v. *Hague*, 449 U.S. 302 (1981). It was based, in fact, solely on Phillips' undertaking with the FPC and its indemnity offer to class members. Despite petitioner's suggestion to the contrary, there is no real basis for claiming that the laws of other States would have led to a different result. *See Shutts I*, 567 P.2d at 1317-21.

In any event, even assuming that the Kansas court erred in applying its own law to all claims, the error was harmless. Phillips itself appears to acknowledge that Oklahoma—where Phillips has its principal place of business, where it held the suspense royalties, and from where it mailed those royalties to all class members—has a sufficient interest to allow that State's law to be applied to all claims. *See, e.g., Supreme Council of the Royal Arcanum* v. *Green*, 237 U.S. 531 (1915). The Kansas Supreme Court in its predecessor decision in *Shutts I* examined Oklahoma law and found it to be in accord with the legal principles applied here. Nothing has changed since then to indicate that any other decision would be warranted now.

ARGUMENT

Raising the spectre of "irreparable damage to federalism," Br. at 39, Phillips seeks reversal of the decision below by invoking first the due process rights of absent class members and then the sovereignty interests of absent States. Curiously, no class member has sought to intervene and no State has filed an *amicus* brief. The reason, we suggest, is because the rulings by the Kansas courts fully protected the legitimate interests of all class members and in no way trespassed on the sovereignty interests of any Sister State. Phillips' real concern is to prevent meaningful class action proceedings and thereby deny many class members relief clearly owed to them—relief that unless aggregated is too small to warrant being pursued. Neither the Due Process Clause or any constitutional notion of federalism requires such an unjust result.

I. PHILLIPS LACKS STANDING TO RAISE DUE PROCESS CLAIMS BELONGING EXCLUSIVELY TO ADVERSE PARTIES WHO ARE FULLY CAPABLE OF RAISING SUCH CLAIMS THEMSELVES.

Phillips' first argument—that the Kansas courts impermissibly exercised personal jurisdiction over nonresident plaintiff class members—rests solely on its ability to

assert the due process claims of those class members. Such an effort, however, is barred by the well-established prudential doctrine requiring that a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) (citations omitted). While there are limited exceptions to this principle, *see, e.g., Singleton* v. *Wulff, supra*, 428 U.S. at 114-116, the Court has never suggested that a party has standing to raise the rights of its *adversary*. The facts of the instant case demonstrate that this is not an appropriate occasion to create such an exception. *Cf. Zablocki* v. *Redhail*, 434 U.S. 374, 380 n.6 (1978) (named defendant cannot raise due process claims of absent *defendant* class members).

Phillips does not argue that *it* is not amenable to suit in Kansas by all nonresident class members. Nor does it assert that any claim, other than one resting solely on the rights of class members, would have prohibited the exercise of jurisdiction by the courts below. Such an argument would be untenable in any event. Only recently this Court made clear that "[t]he requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement . . . represents a restriction on judicial power *not as a matter of sovereignty, but as a matter of individual liberty.*" *Insurance Corp. of Ireland* v. *Compagnie Des Bauxites de Guinee, supra*, 456 U.S. at 702 (footnote omitted) (emphasis supplied). As a result, a nonresident plaintiff, much like any defendant, can consent to jurisdiction. *See Keeton* v. *Hustler, supra*, 104 S. Ct. at 1480-81.[3]

[3] Phillips recognizes this principle when it admits that a state court can exercise jurisdiction over nonresident class members, with or without "minimum contacts," if it uses an "opt-in" provision. Br. at 16 n. 13. *See* p. 21 *infra*. Despite this recognition, however, in its petition for certiorari Phillips claimed that both due process and sovereignty concerns warranted a minimum contacts rule for absent class plaintiffs. Pet'n at 5-12. It has now changed course, arguing in its brief first that the Due Process Clause alone requires such minimum contacts. Later, after making a separate argument concerning the choice-of-law issue, Phillips concludes with a third argument to the effect that federalism concerns bar the combined assertion of jurisdiction *and* application of Kansas law. This combined argument is fundamentally misguided, however. As the Court stated in *Keeton* v. *Hustler, supra*, 104 S. Ct. at 1480, "we do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry." Phillips' argument is especially inappropriate here because its jurisdictional claim is based exclusively on the rights of its adversaries, whereas its choice of law argument rests in part on its own rights. By lumping the claims together Phillips generates much heat but no light. *See* note 18 *infra*.

It is equally obvious that Phillips has no desire to protect absent class members. Quite to the contrary, its only interest in raising their rights is to defeat their recovery.[4] Not a single absent class member has ever sought to initiate separate litigation. And if one had, Phillips' view of his rights would have been very different indeed. Thus, when three absent Texas class members attempted to opt out in *Shutts I*, "Phillips filed a motion to deny the request for exclusion alleging in part that the three men would file a class action suit in Texas." 567 P. 2d at 1313. In short, Phillips plainly is not here seeking to bring about a multiplicity of lawsuits in various states. Its only possible interest, therefore, is to defeat class

[4] To the extent Phillips is concerned whether absent classmembers will be bound by the judgment, that issue cannot be finally resolved in the initial class action. *See* p. 11 *infra*. Moreover, as one commentator put it in discussing *Shutts I*, "the issue of binding nonresident class members was, from the standpoint of the class, virtually moot. The judgment below had been in favor of the class. All that remained was to distribute damages to the victorious class members. A trial court in that posture could easily structure distribution to ensure that acceptance of the award would constitute consent to the court's jurisdiction and waiver of all future claims against the defendant." Note, *Multistate Plaintiff Class Actions: Jurisdiction And Certification*, 92 Harv. L. Rev. 718, 735 (1979) (footnote omitted).

members' claims. There could hardly be a more compelling reason for prohibiting a party from pressing the rights of others.

The rationale that led to this standing doctrine confirms this conclusion. A party is barred from raising another's rights because: (1) "the holders of those rights either [may] not wish to assert them, or will be able to enjoy them whether the in-court litigant is successful or not"; and (2) "third parties themselves usually will be the best proponents of their own rights." *Singleton* v. *Wulff*, *supra*, 428 U.S. at 114 (citations omitted). In this case, it is obvious that absent class members have no interest in seeing their rights raised to defeat their recovery. Those absent class members, moreover, might well take a different view of what their rights are. Thus, the reasons for applying the doctrine are present here.

The Court has authorized a limited exception to this doctrine when (1) the relationship of the litigant to the third party is such that the litigant's interest in asserting the other's rights assures that he will be an effective proponent, and (2) it appears that the third party himself might otherwise be denied the opportunity to protect his rights. *See id.* at 114-116. Neither criteria supports petitioner's standing here.[5] Not only is Phillips' interest di-

[5] *Hanson* v. *Denckla*, 357 U.S. 235 (1958), relied on by Phillips, is not to the contrary. There, a defendant was allowed to assert the in personam rights of a nonresident *co-defendant* who did not appear in the action. In contrast to this case, the co-defendant whose rights were pressed had no interest that was adverse to the party given standing. Moreover, the Court allowed the in-court defendant to raise the issue because under the forum State's law the action could not proceed unless there was jurisdiction over the absent co-defendant. *See id.* at 245. In this case, however, it is clear, as Phillips itself concedes, that an action against it would have been maintainable by Kansas residents, with or without the nonresident class members.

Phillips reads *Hanson* to require only that the defendant have a "direct and substantial personal interest in the outcome" to allow

rectly antagonistic to the interest of those whose rights it seeks to assert,[6] but there is no question that the parties possessing the rights are fully able to exercise them if they so wish. Despite the pendency of the instant action, any nonresident class member remained free to initiate his own suit against Phillips and test whether the Kansas court had properly exercised jurisdiction over him. That issue simply could not be conclusively determined by the first court purporting to assert jurisdiction. *See, e.g., Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912). *See generally* Note, *Binding Effect of Class Actions*, 67 Harv. L. Rev. 1059 (1954). Consistent with these principles, this Court has reviewed many cases involving collateral challenges to class actions, testing whether the first court had obtained jurisdiction over absent class members. *See* cases cited at p. 18 *infra*. In no instance were these claims presented by anyone other than the absent class member himself.

The effect of this standing doctrine as applied here admittedly has an element of non-mutuality to it: by preventing the defendant from asserting the due process rights of absent class members it allows those class members to accept a judgment if the named representatives prevail, while also allowing them a *chance* to relitigate

him to raise an absent party's jurisdictional claim. Reply Br. on Pet'n at 2 (citations omitted). Satisfying that criteria alone is not sufficient, however. *See, e.g., Warth* v. *Seldin*, *supra*; *Singleton* v. *Wulff*, *supra*.

[6] The cases that have allowed parties to litigate others' rights involved relationships where the interest in the exercise of the right was coincident. *See, e.g., Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. 2839 (1984) (fundraiser asserting rights of charitable organization that he solicits for); *Singleton* v. *Wulff*, *supra* (doctor-patient); *Craig* v. *Boren*, 429 U.S. 190 (1976) (seller of beer who wanted to sell to minors who wanted to buy); *Barrows* v. *Jackson*, 346 U.S. 249 (1953) (white convenantor who was sued for failure to honor convenant not to sell to blacks).

their claims if they lose. This consideration, however, should not lead to a different rule in the present situation. Much like with the use of one-way collateral estoppel against a defendant, *see Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), there is nothing unfair about holding the defendant bound even though it is possible that an absent class member may not be. The defendant in these circumstances has "had a full opportunity to litigate the issues" knowing that the decision was presumptively applicable to the whole class. 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1789, at 182 (1972). *See also* Note, *Multistate Plaintiff Class Actions: Jurisdiction And Certification*, 92 Harv. L. Rev. 718, 736-37 (1979).[7] A defendant's legitimate concerns can thus be adequately protected by requiring him to wait until an absent class member attempts to attack the judgment on due process grounds. At that time the defendant will be able to secure a full test of the jurisdictional question by pressing his own interest—*i.e.*, the binding effect of a judgment favorable to him. The issue will then be properly framed.

Nor is it of any consequence here that a defendant in a federal class action under Rule 23 can challenge adequacy of representation or notice, which are requirements designed to protect absent class members. Those and other criteria must be satisfied to comply with the provisions of the Rule, and are supposed to be assessed by "the court with the aid of the parties." 1966 Advisory Committee Notes to Rule 23, *reprinted in* 3B *Moore's Federal*

[7] Before the 1966 Amendments to Federal Rule 23, in fact, class members in so-called "spurious"—*i.e.*, common issue of law or fact—class actions could always unilaterally decide whether to be included in the class, *see Wabash R.R.* v. *Adelbert College*, 208 U.S. 38 (1908), sometimes even after judgment. *See, e.g., Foster* v. *City of Detroit*, 405 F.2d 138 (6th Cir. 1968), *aff'g* 254 F. Supp. 655 (E.D. Mich. 1966); *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561, 569 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962).

Practice ¶ 23.01, at p. 237-27 (1984). Thus, the Rule, in effect, grants the defendant standing that he would not otherwise have, thereby allowing him to raise these issues in the trial court. *See Warth* v. *Seldin*, *supra*, 422 U.S. at 500. And even if such statutorily-created standing would also permit a defendant to press these issues on appeal in a federal class action,[8] that rationale does not apply to a state class action statute, especially as a basis for allowing the defendant to appeal a due process claim, like the one here, that goes beyond the requirements of the statute in question.[9]

[8] Whether the justification for non-mutuality in class actions, *see* p. 12 *supra*, would prohibit a defendant from raising inadequacy of representation or lack of notice to appeal a judgment against him in a federal action is unclear. The issue has almost never arisen for obvious reasons. There were a few instances in the early 1970's where federal courts refused to allow absent class members to rely on a favorable decision in a draft exemption case because they had not received notice, and therefore would not have been bound. *See Schrader* v. *Selective Service System, Local Bd. No. 76 of Wisconsin*, 470 F.2d 73, 75 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972); *Pasquier* v. *Tarr*, 318 F. Supp. 1350, 1353-54 (E.D. La. 1970), *aff'd on other grounds*, 444 F.2d 116 (5th Cir. 1971). These rulings have been subject to considerable criticism, *see, e.g.*, 7A C. Wright & A. Miller, *supra*, § 1789 at 181-83, and their continuing vitality is questionable after *Parklane Hosiery Co.* v. *Shore*, *supra*. *See generally* Note, *Class Action Judgments and Mutuality of Estoppel*, 43 Geo. Wash. L. Rev. 814 (1975).

[9] The "minimum contacts" claim raised by Phillips is not an inquiry relevant to class action certification in Kansas. Pet. App. at 65-67. Thus, even if it could be said that the Kansas class action statute would confer standing in this Court to allow the defendant to litigate the requirements there at issue, that statute would still not give Phillips standing in this case. We note in this regard that the Kansas Supreme Court did consider various challenges by Phillips to the propriety of certifying the class under Kansas law. Pet. App. 20-24, 28-29. The fact that the court also considered the minimum contacts claim presented by Phillips does not confer standing to litigate the issue in this Court. *See, e.g., Tileston* v. *Ullman*, 318 U.S. 44 (1943).

In sum, there is no basis for departing from the established rule and allowing Phillips to raise the rights of absent class members to defeat their recovery. Those rights are fully capable of being raised by the class members themselves, who are best situated to espouse them.

II. A STATE COURT MAY CONSTITUTIONALLY EXERCISE JURISDICTION OVER NONRESIDENT PLAINTIFF CLASS MEMBERS REGARDLESS OF WHETHER THEY HAVE MINIMUM CONTACTS WITH THE FORUM STATE WHERE AS HERE SUCH CLASS MEMBERS ARE PROVIDED WITH ADEQUATE REPRESENTATION, PERSONAL NOTICE, A RIGHT TO PARTICIPATE, AND A RIGHT TO OPT OUT.

Capturing the essence of class action litigation, this Court recently stated that "[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of inequities unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device." *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326, 339 (1980). Phillips disregards this essential recognition as well as the basic differences between plaintiff class members and defendants, and urges the adoption of the "minimum contacts" rule to test all assertions of state court jurisdiction. The effect of such a rule, as the facts of the instant case illustrate, would be to deny judicial access for many small claimants dispersed throughout the country. It would thus allow national businesses to ignore their obligations to such people, knowing that the practicalities of modern litigation will limit, if not eliminate, meaningful redress. To invoke the name of due process in the service of such ends is ironic at best.

A. The Differences Between The Interests Of Nonresident Plaintiff Class Members And Those Of Nonresident Defendants Justify Different Due Process Requirements For Personal Jurisdiction.

"[D]ue process is flexible and calls for such . . . protections as the particular situation demands." *Morrisey* v. *Brewer*, 408 U.S. 471, 481 (1972). With respect to state court assertions of personal jurisdiction, the Due Process Clause imposes certain requirements that make it fair to insist that a person have his interests adjudicated in that State. *See, e.g., International Shoe Co.* v. *Washington, supra*, 326 U.S. at 316; *Hansberry* v. *Lee, supra*, 311 U.S. at 42. Applying this principle to nonresident *defendants*, the Court has held that the "minimum contacts" test, first enunciated in *International Shoe*, is a constitutional prerequisite. There is no basis, however, for extending that standard to absent plaintiff class members, who are in an significantly different position.

It should be noted initially that, notwithstanding Phillips' suggestion to the contrary, the Court has never applied the minimum contacts rule to a non-defendant. Although Phillips quotes the language in *Shaffer* v. *Heitner*, 433 U.S. 186, 212 (1977), to the effect that "all assertions of state court jurisdiction must be evaluated according to the standard set forth in *International Shoe* and its progeny[,]" it conveniently ignores the Court's later explanation of that precise quote as being limited to "defendant[s]." *Rush* v. *Savchuk*, 444 U.S. 320, 327 (1980). *See also Keeton* v. *Hustler Magazine, Inc., supra*, 104 S. Ct. at 1480-81.[10]

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[10] This is not to suggest that a mere label should control the constitutional inquiry. A party faced with the same interests at stake as a defendant would obviously be entitled to the protection of the minimum contacts rule irrespective of the formal status assigned to him by state law. *Cf. New York Life Ins. Co.* v. *Dunlevy*, 241 U.S. 518 (1916) (pre-*International Shoe* case involving interpleader).

Nor is there any justification for unhinging the minimum contacts rule from the specific considerations that gave rise to its creation. A defendant's interest in avoiding litigation is always great, irrespective of where the suit is filed. To afford him a measure of confidence in ordering his affairs and limiting his exposure—*i.e.*, to protect "traditional notions of fair play and substantial justice," *International Shoe* v. *Washington, supra*, 326 U.S. at 316—the Court has held that a defendant must have some contacts with a State before he can be forced to litigate there. A defendant, moreover, is invariably required to obtain counsel and stands to have a judgment entered against him, a judgment that may include coercive court orders, damages, and court costs. And if he fails to appear he faces a default judgment. Before *International Shoe*, these interests were thought to be of such magnitude as to require that the defendant actually be *present* in a State for him to be amendable to personal jurisdiction. *See Pennoyer* v. *Neff*, 95 U.S. 714 (1877).

An absent plaintiff class member, by contrast, has very different interests at stake.[11] The class action device, far from being a means by which to protect the absent class member against being unfairly haled into court, was developed to help assure judicial access for him. *See Deposit Guaranty National Bank* v. *Roper, supra*, 445 U.S. at 339. *See generally* Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684 (1941).[12] In recognition of this purpose, the class action

[11] Whether the minimum contacts rule should apply to absent *defendant* class members is an issue not presented by this case. A defendant class member faces different risks and thus his due process protections should be assesed independently.

[12] Ironically, two of the key cases relied on by Phillips to support its claim of equivalence between defendants and plaintiffs with respect to the minimum contacts rule involved due process holdings invalidating *barriers* to plaintiff access to judicial or administrative proceedings. *See Boddie* v. *Connecticut*, 401 U.S. 371 (1971) (filing fee in divorce proceedings); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) (arbitrary time requirements in administrative proceedings).

was designed so that the absent plaintiff need not retain counsel or appear in court and cannot be subject to coercive court orders, damages, or the imposition of court costs.[13] Rather, the absent plaintiff class member can sit idly by and reap the benefits of the class representative's effort. The only risk he faces is that he may be bound by the judgment if it is not favorable. This interest admittedly merits due process protection, see *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), but it hardly follows that the due process requirements that apply to an absent plaintiff class member should be the same as those that apply to a defendant. *See generally* Note, *Multistate Plaintiff Class Actions*, 69 Iowa L. Rev. 795, 806-809 (1984).

B. The Rights Of All Absent Class Members Were Fully Protected By The Procedures Used In Kansas.

The principles that govern personal jurisdiction in plaintiff class action suits are to be found not in the minimum contacts cases, but rather in *Hansberry* v. *Lee*, *supra*, and the cases discussed therein. Specifically acknowledging that class actions were a "recognized exception" to the "general rules" governing personal jurisdiction, the Court in *Hansberry* stated that such suits were intended to bind even persons "not within the jurisdiction" as long as "the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the

[13] There is no suggestion that Kansas would allow counterclaims against absent class members. If it did, that consideration might affect the constitutional balance. In general, courts have not permitted the assertion of counterclaims against absent class members. *See, e.g., Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 485, 488-89 (S.D.N.Y. 1973), *discussed in* Case Note, 87 Harv. L. Rev. 470 (1973).

former in the prosecution of the litigation in which all have a common interest." 311 U.S. at 41. While invalidating the particular action at issue there on the ground that the named plaintiffs had a conflict with the absent class members, the Court nevertheless took pains to note that it saw no due process objection to state court class actions, even when predicated on a "single issue of fact of law," if "the litigation is so conducted as to insure the full and fair consideration of the common issue." *Id.* at 43.[14]

The Court in *Hansberry* also approvingly cited several cases in which it had upheld multistate (or national) class actions in state and federal courts. *See, e.g., Smith* v. *Swormstedt*, 57 U.S. (16 How.) 228 (1854); *Supreme Council of Royal Arcanum* v. *Green*, *supra*; *Hartford Life Insurance Co.* v. *Ibs*, 237 U.S. 662 (1915); *Hartford Life Insurance Co.* v. *Barber*, 245 U.S. 146 (1917); *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921); *Sovereign Camp of the Woodmen of the World* v. *Bolin*, 305 U.S. 66 (1938).[15] None of these decisions reflected any concern about whether the nonresident plaintiffs had contacts with the forum State. The sole contact in most instances was that the class member held an insurance policy through a group fund or fraternal organization that was chartered in that State. This is particularly important because, as noted, the general rule for personal jurisdiction when these cases were decided required actual

[14] Phillips suggests that *Hansberry* is sapped of its vitality because it antedated *International Shoe*. As noted above, however, the due process requirements for exercising jurisdiction over defendants were *more stringent* prior to *International Shoe*.

[15] *Christopher* v. *Brusselback*, 302 U.S. 500 (1938), relied on by Phillips, detracts nothing from these rulings. In that case, a federal court was found to have lacked jurisdiction over several *defendants* who were stockholders of a bank. Under federal law, the obligations of the stockholders to the bank's creditors were personal and could only be enforced through a suit against them, and not through a suit against the bank.

presence.[16] Even today, we doubt that such a contact would render someone amendable to jurisdiction as a defendant in the chartering State. If it did, it would certainly come as a surprise to millions of individuals who have insurance policies issued by mutual companies or through national membership organizations.

Rather than any minimum contacts concept of jurisdiction, the rationale that supported these so-called "common fund" cases was expressed in the first of the line, *Smith* v. *Swormstedt*, *supra*, a multistate class action involving a disputed church fund.[17] There, the Court noted that even "though the rights of the several persons may be *separate and distinct*," a class action is appropriate if there is "a common interest or a common right, which the bill seeks to establish or enforce." 57 U.S. at 302 (emphasis supplied). Such an action is permissible because:

[16] Phillips asserts "that the decisive factor in [these] cases was the significant affiliating circumstances among the defendant, the forum, and the litigation." Br. at 22 (footnote omitted). If this is meant to suggest that these factors—as distinct from the class nature of the litigation—supported jurisdiction over the nonresident *plaintiffs*, the suggestion is particularly inapt considering that the general rule for jurisdiction then required that a person be present. Nor could jurisdiction over the plaintiff class members have turned on any quasi-in-rem notion. The rights and obligations being adjudicated were individual to each classmember, as the Court made clear. *See, e.g., Hartford Life Insurance Co.* v. *Ibs*, *supra*, 237 U.S. at 673.

[17] The claim by Phillips that no fund did or could exist in this case, Br. at 21 n.18, is mistaken. As Phillips' own behavior indicates, it held the suspense royalties on behalf of the royalty owners. It could have, and we believe should have, kept those funds in a separate interest-bearing account. Had it done so, the royalties *and the interest* would constitute a common fund. The fact that Phillips commingled these royalties with its other monies does not defeat this characterization. If anything, by commingling the funds, Phillips inappropriately put them at risk. Surely in the other common fund cases it would have had no effect on the jurisdictional issue if the fundholder had commingled the funds.

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained.

Id. at 303, *quoted in Hartford Insurance Co.* v. *Ibs*, *supra*, 237 U.S. at 672. This same concern—"to prevent a failure of justice"—and this same assurance—"the rights of all being before the court by representation"—supported the exercise of personal jurisdiction over nonresident class members in this case. *See Restatement (Second) of Judgments* § 41 (1982); 3B *Moore's Federal Practice* ¶ 23.11[5], at p. 23-2893 (1984); *Newberg on Class Actions* § 1206 *et seq.* (1980 Supp.).

Indeed, the Kansas court went considerably further to protect nonresident class members. In addition to insisting that the named plaintiffs have the identical interest at stake as did the absent class members, and that they and their counsel adequately represent the class, the court also required first class mail notice (at plaintiff's expense) to all class members. *See Eisen* v. *Carlisle & Jacquelin*, *supra*, 417 U.S. at 172-178. Moreover, it gave class members the right to participate in person or through counsel, and the right to opt out of the litigation simply by signing and returning to the court a clearly-worded form included with the notice. Taken together these procedures amply protected the legitimate due process rights of nonresident plaintiffs.

Significantly in this regard, while going on at length about the minimum contacts rule and the supposed erosion of state sovereignty in its absence, Phillips is forced to concede that an "opt-in" requirement would be constitutionally adequate to establish jurisdiction over nonresident class members, *even in the absence of any contacts with the forum State.* Br. at 16 n.13. *See also Keeton* v. *Hustler*, *supra*.[18] In short, the real constitutional issue in this case boils down to the difference between an opt-out provision and an opt-in provision. In our view, this

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[18] This concession essentially eliminates the policy arguments that Phillips advances in the third section of its brief. Br. at 36-46. The fact is that any sovereignty concerns related to personal jurisdiction requirements inevitably remain at the mercy of a party, even if he is a defendant, since he may always consent to jurisdiction. *See Insurance Corp. of Ireland* v. *Compagnie Des Bauxites de Guinee*, *supra*, 456 U.S. at 702-03 n.10. Moreover, the kind of rule proposed by Phillips, which apparently seeks to limit where multistate class actions can be brought on the basis of competing state interests, would only lead to further litigation over the relative interests of the states affected by the dispute. It is difficult to see how such an approach would improve relations among the states, to say nothing of its complete lack of constitutional foundation.

We should also note that the "parade of horribles" suggested by Phillips in its final argument, like most such claims, has little substance to it. Phillips asks this Court not to trust the state courts because "they will run riot with the national class action and balkanize numerous areas of substantive law." Br. at 45. The reality is that the state courts have been willing to entertain relatively few multistate class actions, and when they have done so, the cases, much like this one, have usually involved small claims that would otherwise go unremedied, and that are all truly identical in nature and easy to litigate. *See, e.g., Miner* v. *Gillette Co.*, 87 Ill. 246, 428 N.E.2d 478 (1981), *cert. dismissed*, 459 U.S. 86 (1982) (identical claims worth $7.95 or each class member). Indeed in this very case the Kansas courts specifically limited the class to assure commonality of interest and manageability. J.A. 17-19. *See also Shutts I*, 567 P.2d at 1314 ("this opinion should not be read as an invitation to file nationwide class action suits in Kansas"). In trying to discern the reason for the decision below, Phillips would do better to look to its own behavior, rather than that of the Kansas courts.

distinction attempts to parse the due process requirement too finely. *See* Abrams & Dimond, *Toward A Constitutional Framework for the Control of State Court Jurisdiction*, 69 Minn. L. Rev. 75, 99-100 & n.124 (1984) (such a due process objection deemed "trivial"); Comment, *Jurisdiction and Notice In Class Actions: "Playing Fair" With National Classes*, 132 U. Pa. L. Rev. 1487, 1499-1500 (1984). It is certainly difficult to fathom what reasonable concern for fairness to absent class members would justify an opt-out provision for those with minimum contacts and an opt-in provision for all others.

If anything, we think that an opt-out requirement better protects the interests of absent class members. It is, of course, the procedure chosen to govern class actions under the Federal Rules. *See* Fed. R. Civ. P. 23(b)(3), (c)(2)(A).[19] Explaining this choice, then-Professor Benjamin Kaplan, Reporter to the Advisory Committee on Civil Rules that proposed the Rule, stated, "requiring individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who, for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 398 (1967). In short, an opt-out requirement realistically protects small claimants, who are almost certain not to pursue an independant action if excluded from the class.

An opt-out procedure also provides meaningful protection for any class member who prefers not to participate. All he need do is sign a form and mail it to the court. Even in the present case ten percent of the class exercised

[19] There is no "minimum contacts" requirement for exercising jurisdiction over plaintiffs in national class actions conducted under the Federal Rules. *See Califano* v. *Yamasaki*, 442 U.S. 682, 702-03 (1979).

this option. Clearly in cases involving larger sums there is every reason to believe that absent class members will take the steps necessary to decide whether it is in their interest to remain in or to opt out and proceed on their own. *Cf. In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S.Ct. 342 (1982) (invalidating mandatory class action involving large damages claims by plaintiffs); *In re Northern District of Cal. "Dalkon Shield" IUD Products Liability Litigation*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 817 (1983) (same).

The differing effect on large and small claimants of these kinds of transaction costs in class action litigation demonstrates that due process is better served by an opt-out provision than it would be by an opt-in provision. The procedures used by the Kansas courts, therefore, fully protected the rights of all class members, and should be upheld by this Court.[20]

III. THE APPLICATION OF BASIC PRINCIPLES OF RESTITUTION EMBODIED IN KANSAS LAW TO ALL CLASS MEMBER CLAIMS WAS NEITHER ARBITRARY NOR UNFAIR AND RESULTED IN NO RELEVANT CONFLICT WITH THE LAW OF ANY OTHER STATE.

The second issue raised by Phillips concerns the decision by the Kansas Supreme Court to apply general prin-

[20] If the Court should disagree with this position and find that, in the absence of minimum contacts, an opt-in procedure is constitutionally required, this case should be remanded for an opportunity to allow nonresident class members to opt in. It would be grossly unfair to class members who all along have had reason to believe that their claims were being adjudicated in Kansas to be advised that the Kansas proceeding was void rather than voidable. This is especially so now that the statutes of limitations have run in other jurisdictions. Pet. App. 17. Nor would there be any cognizable prejudice to Phillips as a result of such a remand. Phillips' legitimate interest is to be certain that class members are bound. For those who opt in, that binding effect will have been assured. *See* Note, *Multistate Plaintiff Class Actions, supra*, 92 Harv. L. Rev. at 734-37 (urging a post-judgment opt-in requirement in all cases).

ciples of restitution embodied in Kansas law to all class member claims. Phillips asserts that this was error because all but a small percentage of class members had no involvement with Kansas and therefore are not entitled to the application of that State's law. In our view, Phillips' argument rests on an overreading of existing precedent and the suggestion of a conflict among the laws in various States that does not in fact exist. In any event, if it was error to apply Kansas law, the error was harmless. Phillips itself appears to recognize that Oklahoma law could properly have been applied to all claims. Br. at 45. The Kansas Supreme Court examined that State's law in *Shutts I*, and concluded that it would lead to the same result as did Kansas law. On the facts of the instant case, that conclusion from *Shutts I* merits application here.

A. The Constitutional Limitations On A State Court's Choice of Law, Which Are Intended To Protect Basic Fairness, Were Not Violated Here.

The Due Process Clause and the Full Faith and Credit Clause, taken together, require that a state court's choice of law be "neither arbitrary nor fundamentally unfair." *Allstate Insurance Co.* v. *Hague, supra*, 449 U.S. at 308, *citing Alaska Packers Ass'n* v. *Industrial Accident Comm'n*, 294 U.S. 532, 542 (1935). The Court in *Allstate* stressed that, implicit in this constitutional inquiry, was a recognition that more than one State's law could apply, and that no "weighing-of-interests requirement" existed in such circumstances. 449 U.S. at 307-308 & n.10. Thus, a State is free to apply its own law if it has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 313.

In the instant case, the defendant owned property and did a significant amount of business in Kansas. While most class members had no prior contact with the State, they nevertheless were willing to have their rights adjudicated there since they declined to opt out. Whether these facts, standing alone, would be sufficient to justify the application of Kansas law is an issue that was explicitly left open in *Allstate*. *Id.* at 320 n.29. We think it need not be decided here either. Although *Allstate* employed a rule that focused on the "contacts" of the parties to the forum State for testing choice-of-law decisions, the Court did not hold that other factors were necessarily irrelevant to the analysis. The essence of the constitutional inquiry, of course, remains basic fairness to the parties and to the interests of other States. *See id.* at 320-32 (Stevens, J., concurring in the judgment). On the specific facts of this case, those underlying precepts were not infringed. This is especially so because, for there even to be a constitutional issue over choice-of-law decisions, there must be a genuine conflict between the laws of the forum State and those of another State with competing interests. No such conflict was present here.

The Kansas law applied in this case was by no means parochial or arcane. As the decision below makes clear, the legal analysis employed rested on fundamental "equitable principles" requiring that a "party making use of another's money should pay interest on the money so used." Pet. App. 4.[21] This approach flowed almost inexorably from the facts presented. Thus, in essentially identical circumstances under federal law, this Court held that "the imposition of interest on refunds [due to a retroactive refusal by the FPC to approve gas rates] is

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[21] The Kansas Supreme Court applied its own State statute to determine *post-judgment* interest. Phillips does not dispute this application, nor could it. The sole purpose of post-judgment interest is to protect the value of the judgment rendered by the issuing court. Plainly that court has sufficient justification to support the use of its own State's law for this purpose. Addressing a similar post-verdict interest provision, this Court stated that "courts at the forum have been free to apply their own or some other law *as they see fit*." *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 498 (1941) (emphasis supplied).

not an inappropriate means of preventing unjust enrichment." *United States Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 230 (1965). *Cf. Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980) (county's appropriation of interest on interpleader fund violated Fifth and Fourteenth Amendments).

It is important to recognize in this regard that the issue presented here was a by-product of the federal rate-making procedures of the FPC. If the Commission did not engage in *retroactive* rate approval, full royalty payments to all class members would have been paid on a timely basis. Although the FPC does not have authority to regulate royalty payments, *see, e.g., Mobil Oil Corp.* v. *Federal Power Commission*, 463 F.2d 256 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 967 (1972), the federal impact on this case should not be ignored in addressing choice-of-law concerns.[22]

Under the federal regulatory system, if Phillips' rates had been rejected the interest that it would have had to pay purchasers on the same money that it ultimately turned over to royalty owners was dictated by the FPC. *See* 18 C.F.R. § 154.102(c). Subject to FPC approval of the gas prices, moreover, the royalties clearly belonged to the royalty owners even while Phillips held them. *See Phillips Petroleum Co.* v. *Adams*, 513 F.2d 355, 363 (5th Cir.), *cert. denied*, 423 U.S. 930 (1975) (suspense royalties owed to royalty owner who had title at time original gas payment is made and not to subsequent royalty owner who had title when FPC approved rates). Prior to 1961, in fact, Phillips paid suspense royalties on a timely basis. *See Shutts I*, 567 P.2d at 1299. And even when it began

[22] This does not mean that the choice-of-law decision would become "federalized" as Phillips claims. Br. at 34. We argue only that the circumstances at issue, including the implications of federal policy, are appropriate considerations for evaluating basic constitutional choice-of-law concerns.

withholding such royalties pending FPC rate approval, it still made an exception for any royalty owner who put up a bank- or corporate-backed indemnity to cover the suspense royalties *plus interest at the "applicable" FPC rates. See id.* at 1299-1300. In these circumstances, the Kansas Supreme Court concluded that Phillips itself had "establish[ed] an appropriate measure of damages to be awarded the royalty owners, expressed in terms of interest, for the commingling and use of suspense monies by Phillips." Pet. App. 42. The court was simply unwilling to allow Phillips to " 'seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages.' " Pet. App. 31 (quoting *Shutts I*).

Phillips seeks to undermine the force of this straightforward analysis by raising several collateral issues, and then suggesting that other States would have treated them differently. It asserts that it used some of the gas itself rather than selling it, that it had a variety of different kinds of agreements with royalty owners, and that some of these agreements were pursuant to contracts with other gas producers providing for no interest if Phillips had to pay the *producer* higher prices based on subsequent FPC approval of Phillips' rates. Br. at 31-33. The indisputable facts and Phillips' own behavior, however, demonstrate that these claims are merely obfuscatory. Royalty payments to each class member were calculated in identical fashion, irrespective of whether Phillips used the gas or sold it, or whether it was paying royalties on its leases or on its agreements to pay royalties on behalf of producers from whom it had made purchases. Pet. App. 33-41. Regardless of any of these factors, moreover, Phillips treated each class member in precisely the same way: it offered each the same opportunity to receive royalties in a timely fashion upon providing an indemnity, and it paid each his full suspense royalty when the rates were approved. As the Kansas court put it, "[a]ll royalty owners, regardless of residency, particular lease pro-

visions, or royalty agreements, were given the same notices by Phillips and were treated uniformly when suspense royalties and interest were withheld." Pet App. 27.

Phillips further asserts that "the application of Kansas law results in 'unfair surprise' and the 'frustration of legitimate expectations' of Phillips." Br. at 26, *quoting Allstate, supra*, 449 U.S. at 318 n.24. The argument has a hollow ring. Not only did Phillips establish the interest rate through its FPC undertaking and its indemnity arrangement with royalty owners, but at the time that it payed most of the suspense royalties at issue here, *Shutts I*—which had analyzed the law of Oklahoma, Texas, and Kansas—had already been decided. Moreover, Phillips could have had no reasonable expectation that any particular State's law would be applied to the transactions in question since it does business in all 50 states, and its royalty agreements covered residents of 50 states who, in turn, owned leases in 11 different states. Under any view of choice-of-law principles, the number of potential States' laws that could have been found to govern these claims was almost unlimited. Significantly in this regard, Phillips does not claim that any royalty agreement provided that it would be interpreted under the law of a particular State. *See Allstate, supra*, 449 U.S. at 318 n.24.

Nor does Phillips strengthen its choice-of-law claim by combing through opinions in other jurisdictions in an effort to suggest that those States would apply different legal principles to the circumstances presented here. In fact, the cases cited by Phillips from other jurisdictions are either inapposite or simply did not consider the claim decided below. Since, to our knowledge, no State disregards basic equitable principles of restitution, *see, e.g. Smith* v. *Owens*, 397 P.2d 673 (Okl. 1963); *Phillips Petroleum Co.* v. *Stahl Petroleum Co.*, 569 S.W.2d 480, 485-488 (Tex. 1978), it seems doubtful that any would diverge from the ruling in this case. Indeed, in *Shutts I*, 567 P.2d at 1317-21, the Kansas Supreme Court examined the

law of Oklahoma and Texas—the two States that Phillips focuses on in its brief—and concluded that both States would reach the same result as Kansas did.[23] Thus, the

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[23] Phillips makes little effort to suggest that Oklahoma law would justify a different result. *See* Br. at 33 nn.33-34. Both the statutory and constitutional provision it cites were discussed and found inapplicable in *Shutts I*, 567 P.2d at 1319, 1321. As we indicate below, this consideration is sufficient to justify affirmance.

Several of the issues raised by Phillips with respect to Texas law were likewise resolved in *Shutts I*, 567 P.2d at 1317, 1318. Phillips also raises two additional claims based on recent Texas Supreme Court decisions. First, it cites *Exxon Corp.* v. *Middleton*, 613 S.W.2d 240 (Tex. 1981), for the proposition that Texas would not have granted interest to those royalty owners who were due royalties under agreements between Phillips and another producer providing that Phillips would not have to pay interest to the *producer* based on retroactive FPC rate approvals. These agreements, however, were never consented to by royalty owners whose entitlements to royalties were based on pre-existing agreements. Pet. App. 37. In this fundamental sense, the instant case differs from *Exxon Corp.*, where the court relied on the fact that the agreements (called "division orders") which modified the original leases had been "executed *by the royalty owners.*" 613 S.W.2d at 249 (emphasis supplied). Even then, the court held that the orders were binding only "until revoked." *Id.* at 250. The case thus supports the decision below.

Phillips also cites the decision in *Phillips Petroleum Co.* v. *Stahl Petroleum Co., supra*, for the proposition that Texas would require the use of its statutory interest rate rather than the FPC rates used by the court below. That case involved monies due to Stahl based on gas sold to Phillips by Stahl and then resold by Phillips at rates that were regulated by the FPC. When those rates were subsequently approved in 1972, Phillips paid Stahl an additional sum based on the higher rates. Although Stahl never requested any interest, Phillips filed a declaratory judgment action against it *three years after payment*. 569 S.W.2d at 482. Stahl then counterclaimed, asserting specifically that it was entitled to the Texas six percent statutory rate of interest. *Id.* at 483. It never requested the FPC rates and therefore the issue was never considered.

Lastly, we should note that Phillips' description of *Phillips Petroleum Co. v. Riverview Gas Compression Co.*, 409 F. Supp. 486 (N.D. Tex. 1976), a case considered in *Shutts I*, 567 P.2d at 1317, is

necessary conflict, which is a prerequisite to any constitutional choice-of-law inquiry, is absent here.[24]

In view of the foregoing, we submit that the law employed by the Kansas Supreme Court was "neither arbitrary nor fundamentally unfair," and thus violated no constitutional provision. *See generally* Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 Hofstra L. Rev. 59 (1981).

B. Assuming Arguendo That It Was Constitutional Error To Apply Kansas Law To All Class Member Claims, The Error Was Harmless Since Oklahoma Law, Which Is Apparently Conceded To Be Applicable, Would Have Led To The Same Result.

In a closing section of its brief that merges jurisdictional and choice-of-law issues, Phillips states that "Oklahoma appears to be a proper forum to bind all plaintiffs, since each class member had contact with that state and all additional royalties were disbursed from that state. *These contacts with Oklahoma, coupled with the interest Oklahoma has in regulating a company with its principal place*

misleading. That case involved an agreement between Phillips and two local gas producers whereby Phillips would pay royalties based on the unapproved FPC rates subject to an indemnity guaranteeing the return of the excess *plus interest* if the rates were not approved. 409 F. Supp. at 495. The producers *put up the indemnity and received the money*. In that circumstance, the court held that there was no interest due the producers for the time from when they executed the indemnity until they received their payments. Significantly, the court also held that another producer who did not sign an indemnity was entitled to interest on the full suspense payments. *Id.* at 493.

[24] In contrast to the situation in *Allstate, supra*, 449 U.S. at 306 n.6, it is appropriate in this case to determine whether a conflict existed, and not merely whether it was error to apply Kansas law. The Kansas court believed it was applying generally recognized equitable principles, and gave no indication that it thought a conflict with any other State's law existed. On the contrary, as noted above, the court had examined Oklahoma and Texas law in *Shutts I* and found no such conflict.

of business in Bartlesville, might well make it fair to litigate all claims in Oklahoma." Br. at 45 (emphasis supplied). Even without this apparent concession, there can be little doubt that Oklahoma law could be applied to all claims. *See Allstate Insurance Co.* v. *Hague, supra. See also* the "common fund" cases cited at p. 18 *supra*.[25] This fact, in turn, means that even if the court below improperly used Kansas law, the error was harmless. As Phillips acknowledges, Br. at 24 n.23, 27 n.26, the same court in *Shutts I* had applied Oklahoma law to claims identical to those raised in this case, and had concluded that the result would be the same as that reached here.

It is entirely appropriate in the present circumstances to apply the prior Kansas Supreme Court holding to the instant case: Phillips was a defendant in both cases, and it raised the same Oklahoma law issues on that appeal as it did in this case. Moreover, it cites no Oklahoma case since *Shutts I* to suggest that the Kansas court's interpretation of Oklahoma law might be different on reexamination. And although Phillips continues to assert that the Kansas Supreme Court misconstrued Oklahoma law, Br. at 33 nn. 33 & 34, that argument is not only incorrect, it is also beside the point. A state court's application of another State's law is entitled to full faith and credit so long as the legal issue was fairly considered. *See, e.g., Underwriters National Assurance Co.* v. *North Carolina Life and Accident and Health Insurance Guaranty Ass'n*, 455 U.S. 691, 715 (1982); *Milliken* v. *Meyer* 311 U.S. 457 (1940).

[25] Because Phillips' statement about Oklahoma comes in a section of its brief that merges choice-of-law and personal jurisdiction arguments, it is not clear whether Phillips agrees that Oklahoma law could govern all claims. Earlier in its brief, however, it also suggests that if there is a common fund in this case it was in Oklahoma or Delaware. Br. at 23 n.22. Since the money was held at Phillips' headquarters in Oklahoma, for the ultimate benefit of the royalty owners, we think it is clear that that State's law could be applied to all claims, as the "common fund" cases uniformly indicate.

In sum, had the Kansas Supreme Court applied Oklahoma law to the claims at issue here, the judgment below would have been the same. It should therefore be affirmed.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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DATED: January 7, 1985

No. 83-233

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,

Petitioner,

v.

IRA SHUTTS, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court
Of The State of Kansas

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN

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January 7, 1985

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BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN

INTEREST OF *AMICUS CURIAE* PUBLIC CITIZEN

This case raises the question of whether the due process clause of the Fourteenth Amendment precludes a state from including in a plaintiff class persons who are non-residents of the state and who have no connection with it except as class members. The outcome is likely to have a significant effect on the ability of individual states to handle burgeoning litigation through class actions.*

Public Citizen is a nonprofit public interest organization, supported by contributions from more than 50,000 in-

* This brief is filed with the consent of the parties. Copies of the letters granting consent have been filed with the Clerk of the Court.

dividuals each year. Because Public Citizen believes in the importance and necessity of the nationwide class action device as a means of ensuring that relatively small but widely shared claims are resolved, and because its supporters have periodically benefitted from nationwide class action litigation, the interests presented by Public Citizen in this case are the interests of the non-resident class members.

In this regard, Public Citizen believes that its brief will assist the Court because its analysis of the due process issue differs markedly from that advanced by the parties, the other *amici*, and the Kansas courts. Public Citizen contends that the appropriate method for deciding whether due process has been met is to analyze the question under the principles enunciated in *Mathews v. Eldridge*, a case not previously relied on by anyone else. In our view, a determination of "what process is due" to non-Kansas class members is best decided by applying the three criteria set forth in *Mathews*, not by discussing the applicability of cases such as *International Shoe Co. v. Washington*, 326 U.S. 310 (1940), in which defendants were sued in states other than their residence. Because this case involves the very different interests of unnamed, non-resident members of a plaintiff class, the due process cases establishing where a defendant may be sued are simply not relevant. Since the analysis advanced by Public Citizen is fundamentally different than that offered by either party or any other *amicus*, this brief should provide a useful addition to the Court's consideration of this matter.

STATEMENT OF THE CASE

Respondents Irl Shutts, Robert Anderson, and Betty Anderson filed this class action against petitioner Phillips Petroleum Company ("Phillips") in the District Court of Seward County, Kansas, alleging that Phillips had improperly withheld interest on certain royalties payments. These royalties related to the oil and natural gas that Phillips produced from leaseholds in eleven states, including Kansas. There are 33,000 royalty owners residing in all 50 states, the

District of Columbia, and several foreign countries. Approximately 1,000 class members, including the named-plaintiff Shutts, are residents of Kansas.

Over the objection of petitioner, the Kansas Supreme Court upheld the District Court's certification of a nation-wide class of 28,100 members. The class included all of the royalty owners with the exception of 3,400 who opted out and 1,500 to whom notice could not be delivered. The Kansas Supreme Court also affirmed the District Court's determination that Phillips was liable for interest on all royalties at issue and left intact the lower court's ruling that the pre-judgment interest rates should be set by reference to applicable federal regulations. The Kansas Supreme Court held, however, that post-judgment interest should be calculated at the highly favorable fifteen percent Kansas statutory rate instead of the federal regulatory rate which was substantially lower. Under the terms of the judgment below, the class recovered over $3,000,000 in unpaid interest, entitling class members to an average payment of approximately $100.

Despite the highly successful result in this litigation for both Kansas and non-Kansas class members, the petitioner asks this Court to overturn the decision of the Kansas Supreme Court not because its rights have been violated, but on the ground that the due process rights of the successful non-resident members of the class have been violated by the order granting certification of a nationwide class.

SUMMARY OF ARGUMENT

I. This Court should dismiss the writ of certiorari for want of jurisdiction for two closely related reasons. First, the party alleging the due process violation—the petitioner Phillips—is not a non-resident member of the plaintiff class whose due process rights are at stake, but is instead the *adversary* of the entire class. This Court has held that, in general, a person lacks standing to rely on, or assert, the rights of another, with certain limited and well-defined exceptions. *Singleton v. Wulff*, 428 U.S. 106, 113-16 (1976). Whatever the extent of

those exceptions, no case has ever permitted a party with a directly adverse interest to the ones whose rights are at stake to assert those rights. Accordingly, petitioner's due process claims, which are based on the rights of non-Kansas members of the class represented by respondents, should be dismissed because petitioner lacks standing to assert them.

Second, because no non-resident members of the class are before this Court to advance this due process claim, this claim lacks the concreteness and specificity necessary for adjudication. While Phillips speculates about the potential deprivation that may be caused to non-resident class members, nothing in the record supports its self-serving conjecture that there will in fact be any demonstrable injury to non-resident members of the class. No non-resident members have come forward to raise this claim, and class members who desired to proceed independently had an absolute right to do so by opting out of the class.

2. In any event, there has been no violation of due process because the non-resident class members have been given all of the procedural protections to which they are entitled under the three-part balancing test established by the Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which focuses on: (a) the private interest of the class members, (b) the need for additional procedural protections, and (c) the governmental interests at stake—including the administrative and financial burdens—which would attend affording greater protection.

The facts in this case clearly demonstrate that the standards of due process have been met. First, the private interests of the class members, measured at the outset of this litigation, were simply their unliquidated claims against Phillips, which had value only in the event that the class prevailed. Second, because of the commonality of interests among the class members, and because the Kansas courts found that the class was adequately represented in granting class certification, the procedural protections afforded non-Kansas class members were plainly adequate, particularly in light of the unqualified right to opt-out and the exclusion of class members to whom

notice could not be delivered. Third, Kansas has agreed to accept the substantial burden of handling a nationwide class, and no class member has expressed an interest in litigating the matter on behalf of the class elsewhere. Accordingly, allowing the action to proceed in the Kansas courts ensures a forum for this litigation and conserves scarce judicial resources. Therefore, since all three factors support the maintenance of a class including both Kansas and non-Kansas members, due process has been satisfied.

ARGUMENT

Introduction

At the outset, it is worth underlining the obvious: no prior decisions of this Court determine the outcome of this case. Some of the cases cited by the parties are useful by analogy; others, which reached the same result as did the court below, arose in contexts which are arguably distinguishable; and most of those relied on by petitioner are not cotrolling or even relevant because they deal with the far different question of whether a *defendant* may be sued in a state with which it has only minimal contacts and can be made to go to the expense and inconvenience of litigating in a distant forum. This is, therefore, the first occasion for the Court to address the question of whether a state court may properly include as members of a plaintiff class persons who reside outside the forum State and whose only connection with the forum is their membership in the plaintiff class.[1]

To make the necessary analysis, it is useful to begin with the constitutional provision at issue here, the second clause of the first section of the Fourteenth Amendment. It provides "nor shall any State deprive any person of life, liberty, or property, without due process of law . . .." Thus, the question in this case is whether any person (*i.e.*, any non-resident of Kansas) has been or will be deprived of any property (*i.e.*, a

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[1] Similar questions were presented in *Gillette v. Miner*, 454 U.S. 86 (1982), but following briefing and argument this Court dismissed the writ for lack of a final judgment.

claim against petitioner) without due process of law, as a result of the certification of a nationwide class. As we demonstrate in Part II, not only has there been no deprivation of any property rights of any non-Kansas class member, but the availability of the nationwide class has conferred a substantial benefit on a significant number of class members who were able to obtain a favorable judgment in a situation in which an individual action might not have been economically feasible. Before turning to that discussion, we first demonstrate why petitioner's due process claim should be dismissed for want of federal jurisdiction.[2]

I. THE COURT SHOULD NOT DECIDE THE DUE PROCESS CLAIM ASSERTED BY PETITIONER.

This case presents the Court with what is, at best, a highly anomolous and unconventional claim: Phillips, the defendant below, seeks to champion the property rights of more than 28,000 of its adversaries—the non-Kansas class members—and has urged this Court to protect those rights by throwing their claims, now reduced to judgments, out of the court. There are two closely related reasons why this Court should dismiss petitioner's due process claim for want of jurisdiction.

First, the due process claim is not being raised by individuals whose rights are subject to possible deprivation, but by their adversary. The Fourteenth Amendment rights at issue here are the property rights of non-Kansas class members to be paid interest on their royalty income from Phillips. Phillips has not suggested that any of its property rights are jeopardized by the nationwide class action device. While petitioner does not specifically identify who it is that is depriving the non-Kansas class members of their rights, it can

[2]We do not urge dismissal of petitioner's choice of law claims. However, we agree with respondents that the courts below did not err in their resolution of the choice of law questions. Moreover, it should be stressed that the choice of law question in no way affects the Court's determination on the due process issue. Had it been necessary, the Kansas courts could have properly structured the class, through the use of appropriate sub-classes, to apply the laws of different fora to various subgroups within the class.

only be the named plaintiffs, whose interests are identical to those of the rest of the class, and the Kansas courts, which are wholly neutral in this matter. Thus, if any such deprivation is taking place, it is plain that petitioner lacks standing to complain about it since petitioner is suffereing no injury at all.[3]

The law in the federal courts is clear that questions of justiciability, including those of standing, are matters of federal law. Thus, the fact that the Kansas courts have entertained the petitioner's due process claim does not require its consideration by this Court. *See, e.g., Tileston v. Ullman,* 318 U.S. 44 (1943); *Coleman v. Miller*, 307 U.S. 433, (1939)(Frankfurter, J., concurring). The general rule in federal courts is that a party has standing only to raise claims that are personal to him and that the courts will not allow one person to advocate the rights of another. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978); *Barrows v. Jackson,* 346 U.S. 249, 255 (1953). *See generally,* Note, *Standing to Assert Constitutional Jus Terii,* 88 Harv.L.Rev. 423 (1974).

Despite petitioner's suggestions, *Hanson v. Denckla*, 357 U.S. 235 (1958), is not to the contrary (Pet. at 5 n.5). There this Court recognized the general prohibition against vindicating the rights of absent third parties, but found the rule inapplicable because of Florida law, which made a trustee an indispensible party to claims involving a trust, and thereby gave any defendant in the action, even one properly before the Florida court, a right to object to the lack of jurisdiction over the Delaware trustee. *Id.* at 244-45. By contrast, nothing in the law of Kansas, or for that matter of any other state, gives petitioner an independent right to object to the inclusion of additional non-resident members of the plaintiff class. In essence, what petitioner is claiming here is that it has the constitutional right to choose to be sued in each of the fifty states—not just Kansas—and that the due process rights of non-Kansas class members are the source of that constitu-

[3] This is not a case in which a class action could have been avoided, since there are approximately 1,000 Kansas residents in the class.

tional right. No case has ever held that a defendant may assert any claim of that kind in federal court.

While this Court has recognized certain limited exceptions to the general rule and has, on rare occasions, allowed one person to argue for the rights of another, each of those cases involved special relationships, directly tied to the underlying litigation claim. Thus, this Court has allowed suits by schools on behalf of their students, *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), physicians on behalf of their patients, *Doe v. Bolton,* 410 U.S. 179, 188 (1973), and organizations on behalf of their members, *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 342-43 (1977). Furthermore, unlike this case, those cases often involved situations where the real party in interest was incapable of effectively asserting its rights. None of these cases, however, bears any resemblance to the situation presented here, where not only is there no special relationship between Phillips and the non-Kansas class members, but they are in fact adversaries.

Moreover, insisting upon strict adherence to the law of standing is particularly appropriate in this context since objections which are based on the due process clause of the Fourteenth Amendment are, unlike subject matter jurisdiction, personal to the individual and can be waived. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea,* 456 U.S. 694, 699 (1982). This factor has generally been found to be important by this Court in deciding whether to allow the assertion of the rights of another, permitting it to be done only in very limited circumstances. *See Singleton v. Wulff,* 428 U.S. 106, 113-116 (1976). Morever, this factor assumes critical significance here, where all class members, including non-Kansas residents, received actual notice of this litigation and had a meaningful opportunity to opt out, and thus at least arguably have waived any due process objection which they may have had.[4]

[4] The fact that under the class action rules of Kansas, as well as under Rule 23, Fed.R.Civ.P., and the civil rules in many states, a defendant is entitled to raise various objections in opposing a motion for class certification does not confer standing on petitioner to raise the constitutional claim in this Court. The rules governing objections to class certification serve two distinct functions: *first,* permitting the defendant to protect its interest in assuring, *inter alia,* that the class members have a common claim, that the named-plaintiffs' claims are typical, and that the class definition is not overly-inclusive; and *second,* protecting the interests of the absent class members in assuring that the representation is adequate and that the class is not under-inclusive.

With respect to the first set of issues, defendants have a right to raise those objections to protect their own interests since it is these interests, at least in part, that the rules are intended to protect. With respect to the second set of issues, the rules confer on defendants the right to raise those objections solely to assist the court in its function of protecting the interests of absent class members. In no sense, however, can these procedures be read to confer a broad, unbridled right on defendants to raise any and all interests the absent class members might assert. On the contrary, to the extent that these rules confer "standing" on defendants to raise issues which they would not otherwise be entitled to raise, this grant of standing is not limitless, but is constrained by the rules which confer it. Here, there is no suggestion that any *federal* rule of civil procedure, any federal statute, or any rule of this Court permits defendants to raise the due process rights of members of a plaintiff class in opposing class certification. Thus, the fact that a defendant might have standing to raise this objection in a Kansas court is no basis for a finding that it also has standing to raise it in a federal court. Finally, to *amicus'* knowledge, no court has ever focused on the question of a defendant's standing to raise issues not expressly encompassed by the class action procedures in opposing class certification.

Most important of all for purposes of this case, no prior decision has ever allowed one party to champion the interests of another when they are in fact in a direct adversary relationship, as Phillips is to the entire 28,100 member class, including the non-Kansas members whose due process rights Phillips is pleading before this Court. It is no more proper, we submit, for Phillips to be urging this Court to "protect" the due process rights of non-Kansas class members by throwing out the judgments which have been obtained by respondents on their behalf, than it would be for the proverbial fox to be complaining to the farmer that the mother hen is not adequately caring for her baby chicks. Surely, had Phillips won below it would now be arguing that all class members were in fact bound by the adjudication in Phillips' favor. Thus, given the clear conflict of interest between Phillips and the non-Kansas class members, it would turn the law of standing on its head to permit Phillips to proceed to advocate the due process rights

of its adversaries—the non-Kansas class members—before this Court.

There is a further reason for not reaching the due process claim: not only is it being asserted by a party without standing to raise it, but it also lacks a concrete, fact-specific setting in which it may be decided. This Court has often emphasized the necessity of a firm factual basis as a predicate for adjudicating important constitutional claims. *See United Public Workers of America v. Mitchell,* 330 U.S. 75, 90 (1947); *Public Affairs Associates, Inc. v. Rickover,* 369 U.S. 111 (1962). Although there is no reason for departing from that practice here, Phillips urges this Court to ignore these questions of ripeness and to issue a sweeping constitutional ruling on the basis of a highly theoretical and abstract legal argument that is not grounded on the facts. Phillips has wholly failed to identify a single individual whose due process rights have been infringed or to demonstrate in some non-conjectural way how the non-Kansas class members have been harmed. No class member has come forward, and given the highly favorable disposition of this action from respondents' standpoint, it is difficult to see how any class member, regardless of state of residence, has been harmed. Petitioner's complete failure to provide a concrete setting for the adjudication of its broad due process claim provides a further basis for dismissal of this claim for want of federal jurisdiction. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 346-48 (1936)(Brandeis, J., concurring).[5]

[5] In the due process cases cited in Point II *infra,* this Court has on a number of occasions determined that it is necessary to look at the particular circumstances of the alleged deprivation rather than attempting to resolve broad, generalized claims. *See, e.g., Lassiter v. Department of Social Services,* 452 U.S. 18, 31-32 (1981); *Gagnon v. Scarpelli,* 411 U.S. 778, 790 (1973).

II. INCLUDING NON-KANSAS RESIDENTS AS MEMBERS OF THE PLAINTIFF CLASS DID NOT DEPRIVE THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

As noted above, *amicus* believes that there are no decisions of this Court which deal directly with the situation presented here. Most of the cases on which petitioner relies involve attempts to sue defendants in jurisdictions where they have few, if any, contacts. On the other hand, respondents' principal cases are at least arguably distinguishable because they involve plaintiff classes with a direct connection with the forum state through, for example, the existence of real or personal property in the state, *Hansberry v. Lee,* 311 U.S. 32 (1940), *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), or the issuance of an insurance or similar policy from the headquarters in the state in which the litigation took place, *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915), *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938).

There is, however, a line of Fourteenth Amendment due process cases that provides a bridge by which the analytical void can be spanned—those decisions involving the issue of to what extent due process protects individuals from deprivations by administrative actions of federal and state agencies. *See, e.g., Board of Regents v. Roth,* 408 U.S. 564 (1972). Of particular significance in this case, since there is no question that the non-Kansas class members have a protected property right in their claim against Phillips for interest owed on royalty payments, is *Mathews v. Eldridge,* 424 U.S. 319 (1976), which sets forth the proper analysis of "what process is due" before a state may deprive a person of an interest protected by the Fourteenth Amendment. Although *Roth* and *Mathews* arose in the administrative rather than the judicial context at issue here, the constitutional origins of the right, and the analysis required, are identical. *See Lassiter v. Department of Social Services,* 452 U.S. 18, 33 (1981)(due process standards are intended to ensure that "judicial proceedings are fun-

damentally fair"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 426 (1982) (determining amenability of defendant to suit by utilizing due process cases including *Mullane, Roth* and *Mathews*).

This approach to the due process rights of non-Kansas class members has not been argued by either party, nor was it discussed by the courts below. Nonetheless, we believe that this analysis is appropriate in determining whether an unconstitutional deprivation would occur if the non-Kansas class members were bound by the decision in this case. Indeed, the balancing of interests required by *Mathews v. Eldridge* produces an inquiry which is substantially the same as that under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which was described by this Court in *Shaffer v. Heitner*, 433 U.S. 186, 206 (1977), as a determination of "whether the standard of fairness and substantial justice has been satisfied." Or, as this Court described the standard in *Hansberry v. Lee*, *supra*, 311 U.S. at 42, "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are bound by it."

In *Mathews*, this Court required the balancing of three separate factors to determine what process is due:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. 424 U.S. at 335.

Accordingly, we will consider each of the three in turn.

1. *The Private Interest*

The property interest at stake when this litigation was instituted was each class members' claim against Phillips for the interest owed on royalty payments. At the time that this case was filed, it might have been possible to estimate

roughly the value of each class member's claim simply by multiplying the royalties paid over the relevant time period by some standard measure of interest. This estimate, however, would then have been discounted by factoring in a variety of intangibles—the risks of litigation, the choice of law questions which could arguably affect the interest rate to be paid, and the costs and attorneys' fees which would inevitably attend litigation to compel Phillips to pay the interest. Indeed, it appears from the failure of any other class members to file representative actions and the lack of substantial individual litigation to recover the interest on the royalties, that when this action was instituted, most class members perceived their economic stake as insufficient to warrant their own efforts to recover what eventually turned out to be a judgment averaging $100 per class member, before expenses and attorneys' fees. Had the class members' stake been more substantial, there clearly would have been a multiplicity of actions. And if any class member believed that his or her interest was sufficient to warrant the cost of an individual action, the guaranteed opt-out under Kansas' procedures provided absolute protection for that member, whether or not a resident of Kansas.

Moreover, in the event that respondents failed in their claims against Phillips, each class member would have lost only the value of his or her claim, but no class member would have had to pay a penny on account of any adverse judgment. In this respect, this case poses a far different question than one in which there is a defendant class. This distinction between a losing plaintiff and a losing defendant is one which former Chief Judge Henry J. Friendly found convincing in his oft-cited article, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1295-96 (1975)("For starters, I would draw a distinction between cases in which the government is seeking to take action against a citizen from those in which it is simply denying a citizen's request . . . whatever the mathematics, there is a human difference between losing what one has and not getting what one wants.") *Cf. Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853

(1982)(distinguishing for First Amendment purposes between removal of library books and refusal to acquire them). Thus, for most class members this litigation entailed little economic risk and the possibility of a modest gain.

While comparisons between deprivations may be somewhat subjective, it is worth noting several instances in which this Court has recently found a deprivation not to be serious enough to warrant additional due process protections. Thus, in *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court did not consider that a student's interest in avoiding an undeserved paddling was sufficiently serious to warrant a neutral, prior determination of fault because of the potential tort remedies available should the punishment have been wrongly inflicted. In *Lassiter v. Department of Social Services, supra,* the Court concluded that even the permanent removal of parental rights to a child on account of neglect was not so serious as to require an appointed attorney in every case. And in *Board of Curators, University of Missouri v. Horowitz,* 435 U.S. 78 (1978), the Court agreed that, despite being dismissed from medical school without a formal trial, the plaintiff had received adequate procedural protection. Thus, considering the fact that the interest at stake here was merely an unliquidated claim which would have had no value in the absence of this successful litigation, the private interest in additional process for non-Kansas class members is clearly not significant. And when the protections afforded the non-Kansas class members here are measured against the very limited ones afforded in *Ingraham*, *Lassiter*, and *Horowitz*, which were found sufficient to satisfy due process, it is difficult to see how the rights of any class members have been violated.

2. *Risk of Erroneous Deprivation*

This element has two components, the first encompassing an estimate of the likelihood of error from denying the added process, and the second requiring an estimate of the probable value of any additional safeguards. *Mathews v. Eldridge, supra,* 424 U.S. at 335. Once again, it is necessary to focus the inquiry on precisely which safeguards were and were not

available, depending on whether the plaintiff class was limited to Kansas residents. In cases in which an out-of-state defendant has sought to avoid being sued, the due process concerns have centered on the burdens of being required to litigate in a distant forum, principally the added costs and inconvenience, and the risk of a default judgment from not contesting the claim. *See, e.g., Kulko v. Superior Court of California,* 436 U.S. 84, 91 (1978). Added safeguards in that context increase fundamental fairness by permitting the defendant to litigate at "home" or in some other, more convenient, forum.

The safeguards issue regarding non-Kansas class members presents a rather different set of considerations. Initially, it should be noted that, except for the named plaintiffs, the entire plaintiff class, Kansas and non-Kansas residents alike, is in the same situation regarding potential additional safeguards. All of the class members are being represented by Kansas attorneys, who the Kansas courts must decide adequately represent the interest of all class members. If there is adequate representation, then there is nothing for unnamed class members to do in order to protect their interests.[6]

The only time that the distinction between Kansas and out-of state residents could make a difference is if there were dissatisfaction with the representation. If class members wished to bring in their own counsel, it might be less convenient to do so for a non-resident, but only if that person wanted to use an out-of-state attorney, or if he or she wished to play a personal role in the litigation. And if either a resident or a non-resident is sufficiently dissatisfied, they can opt out, with no additional difficulty for the out-of-stater. Indeed, here 3,400 putative class members exercised their right to opt out. They were then free to litigate on an individual basis

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[6] Most class action cases do not require the direct participation of class members, so there is little likelihood that class members would have to travel to Kansas. Typically, the class members' active participation is limited to the proof of claim stage, and that is usually accomplished by filing claims by mail. Thus, in all but the rarest case, there would be no greater burden on non-residents than residents.

against Phillips in their own state of residence or in any other place where Phillips might properly be sued. Thus, the benefit of the added safeguard—being able to participate directly in this controversy, either in this litigation or in a separate action—is minimal, especially in light of the nature of the claim, the amount in dispute, and the availability of suit in other fora. While it may be that in some cases, some out-of-state class member may be disadvantaged in some unknown way, as this Court observed in *Mathews* in commenting on this second element, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." 424 U.S. at 344.

It is also important to emphasize what is not involved here. This is not a case where class actions have been filed in several states, and Kansas is seeking to require all of the plaintiffs to litigate in its courts. To *amicus'* knowledge, even though Phillips' failure to pay interest on these royalty payments took place years ago, this is the only representative action pending. Thus, whatever the Kansas courts might be required to do when there are non-resident class members actually, and not merely theoretically, interested in maintaining their own actions, there is no basis here to believe that any additional protection in the form of allowing others to litigate their cases elsewhere is wanted, let alone warranted or constitutionally mandated.

It is also worth underscoring what it is that petitioner suggests that the Constitution requires non-Kansas class members to surrender in exchange for the right to litigate their claims in their own states. There are, in the person of respondents, with the assistance of their counsel, class members who are prepared at their own expense to take on the class' cause. The Kansas court have agreed to adjudicate the case, and they have established procedures to ensure that all class members, regardless of their state of residence, are adequately represented and were fully notified of this proceeding. If petitioner prevails on its due process argument, the

majority of class members will be stripped of the benefits of the outstanding judgment against Phillips and have to go elsewhere to find representation, a highly unlikely event, except perhaps in those few states where there are enough class members to justify the cost of bringing suit.[7] It may be that a few class members would follow that path, assuming that by now their claims are not time-barred. But for most, if this case does not go forward on a nationwide basis, their claims will never be converted into judgments and will probably never even be the subject of another legal action. If it is the rights of these class members that the due process clause is intended to protect, it is difficult to imagine how their lot is improved if petitioner's view of the law is accepted.

3. *The Governmental Interest*

An analysis of this aspect of the due process balance further demonstrates the uniqueness and untenability of petitioner's claim. In the typical due process case, the government argues that it should not be made to do more than it is already doing. Here, by contrast, Kansas is already doing *more* than petitioner says due process allows, *i.e.*, agreeing to take on the burden of handling a class composed not only of approximately one thousand residents, but thousands of others who have no direct connection with the State. Thus, the inquiry must focus on the interest of Kansas, which is the only State which has expressed any interest in this litigation. If Kansas is willing to take on the added burdens, it is difficult to see what aspect of due process prevents it from doing so. Moreover, to limit the class to Kansas residents would undermine the State's policy to provide an adequate means, through the more effective device of a nationwide class, of vindicating the rights of its residents who were injured in the manner found here.

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[7] In light of each class member's relatively modest stake in this litigation, and the fact that many jurisdictions have few class members, striking down the nationwide class action device will mean, as a practical matter, that many of the class members will not be able to pursue their claims at all because of the financial burdens which are inevitable in this sort of litigation.

Arguably, the governmental interest here might be that of other states in having a forum to enable their residents to litigate there. However, that interest would be relevant only if, contrary to the history of this litigation, a resident of another state filed his or her own class claim, and Kansas was depriving that other state of hosting that lawsuit.

There is another, more basic, reason why the governmental interest is strongly opposed to the claim of petitioner. In its brief, petitioner implicitly suggests that no state could constitutionally entertain a unified action that encompasses all 33,000 potential class members. Indeed, while petitioner suggests that other states, namely, Oklahoma and Texas, have a closer relationship to the facts giving rise to this case and have greater numbers of class members as residents, petitioner avoids grappling with the question of whether it would have been proper for either of those states to entertain a nationwide class action suit. If petitioner is correct, the result will be not one but at least 50 lawsuits, with several states having to deal with cases with just a few class members.[8]

Surely, the governmental interest in efficient and speedy resolution of claims is not advanced by interpreting the Constitution to require a multiplicity of class or individual actions in lieu of a single action brought in Kansas. Indeed, even in the context of a defendant's claim not to be subjected to litigation in a State other than its residence, this Court recognized in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), that the "burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies . . .." Plainly, that in-

[8] Petitioner's analysis cannot turn on sheer numbers of "resident" class members. For class members residing in Maine or Alaska, their due process rights are no more protected or in jeopardy if this case goes forward in Oklahoma than they are if it proceeds in Kansas. The proper inquiry, we suggest, is whether the forum state provides adequate protection for all class members, including both residents and non-residents.

terest will be seriously undermined if petitioner's view of the law is adopted.

Although petitioner's brief seems to suggest that a person's rights cannot be finally determined unless he is actually a party before the court, there is no such hard and fast rule. In a number of cases involving the doctrines of collateral estoppel and *res judicata*, the courts have recognized limited exceptions in which non-parties may be bound by prior judicial determinations. *See, e.g., Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593 (1974); *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 94-102 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977). As the thoughtful opinion of Judge Wisdom in *Southwest Airlines* indicates, courts will carefully examine the claim that non-parties are bound, and will permit that to occur only when there is an identity of interest with the prior litigants, and where the interest of the non-party has been adequately represented by them. Since here the interests of the class members and respondents are the same, and since the Kansas courts have taken measures to ensure adequate representation, these cases lend further support for the proposition that due process does not prevent inclusion of all 28,100 class members.[9]

If this Court were to rule that no one state could entertain a class action such as this, the states might well seek from Congress, and Congress might well enact, a new jurisdictional provision allowing multistate class actions to be brought in federal courts, regardless of the amount in controversy. However, even this solution may be unconstitutional under petitioner's theory. Although petitioner appears to suggest that a federal alternative is somehow different, it never acknowledges that it would be constitutional for Congress to

[9] Another example of a situation in which this Court has allowed a state court to adjudicate important rights, even though one of the parties had no connection whatsoever with the forum state, is the area of divorce. *See, e.g., Williams v. North Carolina*, 317 U.S. 287, 297-99 (1942). While the divorce area is factually distinguishable from the class action involved here, the divorce decisions nonetheless demonstrate that the mechanical boundary line which petitioner seeks to erect is not constitutionally based.

allow this case to be heard in a single federal court. In part, this may be due to the requirement in diversity suits that, at least until now, the rules regarding personal jurisdiction are those of the forum state. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, supra,* 456 U.S. at 707-709, *id.* at 711-713, (Powell, J., concurring). *Cf. Califano v. Yamasaki,* 442 U.S 682, 702-03 (1979) (nationwide class upheld based on federal claim). Thus, accepting petitioner's theory might well make it impossible for even the federal courts to handle multi-state plaintiff diversity class action cases where state courts could not constitutionally do so.

Of course, all of these problems can be avoided by concluding that due process is not violated when a state court includes non-residents in its class actions, at least where there is no other state in which similar claims are pending, where all class members receive actual notice and have an unqualified right to opt-out, and where the court finds that the plaintiff and his counsel adequately represent all members of the class. In this connection, it would be well to recall the admonition of this Court in *Mathews v. Eldridge, supra,* that "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of the . . . programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." 424 U.S. at 349. Kansas' judgment that non-resident members of the plaintiff class are adequately protected is plainly a reasonable one which should be upheld. Nothing in the concept of due process requires Kansas to accept a nationwide class, but if it chooses to do so, due process does not forbid it.

4. *The Balance Lies Decidedly In Respondents' Favor*

Having reviewed all three factors, the Court must strike an appropriate balance to decide whether the process given out-of-state class members is adequate. In doing so, the Court should keep in mind there is no claim that any other aspect of this action was handled in a manner that would jeopardize the constitutional rights of the non-Kansas class members, *i.e.*, notice was inadequate, the claims of respondents were not

typical or were antagonistic to the other members of the class (*see Hansberry v. Lee, supra*), or respondents and their counsel did not adequately represent the interests of class members, both Kansas and non-Kansas residents.

Based on these considerations, it seems clear that non-Kansas class members have received all the process to which they are due. None of them has expressed any interest in separate class litigation on their claims, nor would a nationwide class preclude them from proceeding alone, if they elected to opt out and did so in a timely fashion. There are no other protections that are likely to reduce the risk of an erroneous loss of their claim, and the government interest in not having multiple class suits is very strong. Therefore, even if there had been an unfavorable judgment in this case, which non-Kansas class members sought to attack by claiming that they were denied due process, there is no basis for concluding that the fact of non-residence alone would entitle them to argue that the Kansas courts had deprived them of property without due process of law.

As this Court observed in *Kulko v. Superior Court of California, supra,* 436 U.S. at 92, the concept of due process is "not susceptible of mechanical application . . .." *See also Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961)(rejecting fixed rules of due process in favor of flexible approach balancing the governmental and private interests involved). In light of those decisions, and when judged by the standard of *Mathews v. Eldridge*, there can be no doubt that the out-of-state class members in this case have received all of the process that they are due. As this Court recognized in *Mathews*, "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." 424 U.S. at 348. If petitioner is correct that at least fifty separate actions are required, it is plain that the line will have been crossed, and the costs to society will be too great to require it. Accordingly, the Court should affirm the judgment below.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Kansas should be affirmed.

Respectfully submitted,

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January 7, 1985

No. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,

Petitioner,

v.

IRL SHUTTS, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF OF AMICUS CURIAE THE CONSUMER COALITION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Amicus, the Consumer Coalition, is an Illinois not-for-profit corporation, organized for the advancement of the rights of consumers in the courts and in the marketplace. The Consumer Coalition was Amicus when the issue of the multi-state class action was last raised in this Court in *Miner v. The Gillette Company*, 87 Ill. 2d 7, 428 N.E. 2d 478 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*,

459 U.S. 86 (1982). Amicus believes that the imposition of the "minimum contacts" test to state court class actions would deprive the state courts of the continued ability to conduct national class actions without which national groups of consumers would be unable to obtain redress in disputes with multi-state enterprises.*

SUMMARY OF THE ARGUMENT

The contention of Phillips Petroleum Company ("Phillips") and its supporting Amici that multi-state class actions must comply with the "minimum contacts" test for personal jurisdiction is a radical departure from the precedent of this Court and the practice of the lower courts. Since the beginning of this century, the state and federal courts have adjudicated multi-state class actions without applying the jurisdictional tests employed in individual actions. Multi-state class actions are the only procedure known to our judicial system for resolving issues between large numbers of widely spread class members and multi-state enterprises. Such enterprises generally establish presences in numerous states. Class members conduct business with multi-state enterprises in the states of their residences and will not have minimum contacts with any one forum. Thus, the "minimum contacts" test would require fifty separate adjudications to complete, for example, one state insurance reorganization for a nationwide insurer or one trustee's accounting for a multi-state trustee or one nationwide consumer dispute. Simultaneous

* The consents of Petitioner and Respondent to the filing of this brief have been filed with the Clerk of this Court.

state court class actions have never been employed to complete the resolution of any of these multi-state disputes. Any such requirement would only prevent the state system from conducting adjudications essential to the states and to the country.

Rather than protecting class members' due process rights, the "minimum contacts" test would serve to deprive them of the opportunity to have their claims adjudicated. The "minimum contacts" test is intended to protect persons from being "haled" before foreign courts. Class actions are conducted with the participation only of the representative class members and are intended to fully and fairly adjudicate the rights of the body of the class without bringing them before the court. Thus, multi-state class actions do not require that class members be "haled" before a foreign court.

The hypothetical problems asserted by Phillips and its Amici are no reason to eliminate a procedure so essential to the administration of the state system of justice as the multi-state class action. To the extent that any of the problems suggested by Phillips are real rather than hypothetical they should be solved on a case by case basis with solutions addressed to the specific problems. Phillips' problems require neither the application of the "minimum contacts" test to non-resident class members nor the destruction of the multi-state class action which would result.

Finally, the lower court opinion contains broad language regarding the requirement of individually mailed notice to all identifiable class members at the outset of the litigation. The time and manner of notice required by the Constitution in class actions is not raised by the petition and has not been briefed by the parties. It is of enormous gravity and should not be addressed by the Court in the instant case.

ARGUMENT

I.

THIS COURT SHOULD NOT EXPAND THE APPLICATION OF THE MINIMUM CONTACTS TEST OF PERSONAL JURISDICTION IN INDIVIDUAL ACTIONS TO NON-RESIDENT CLASS MEMBERS IN STATE COURT CLASS ACTIONS.

A. Phillips Seeks A Radical Change In The Law.

Phillips' contention here is that no plaintiff class may include absent class members unless those class members satisfy the "minimum contacts" test for jurisdiction over litigants in individual actions and primarily for jurisdiction over defendants. Phillips' claim is contrary to the great body of the law which has existed in this country for many years and the destructive effect on the administration of justice which would result from its grant demands its rejection.

Class actions are simply "a different animal" from individual actions in which all of the parties personally participate in the court proceeding. Since the latter part of the 19th Century, see, e.g., *Smith v. Swormstedt*, 57 U.S. 288 (1853), the courts have been conducting multi-state class actions without applying the jurisdictional principles applicable to individual actions. Some of the reported cases contain explicit discussion of the jurisdictional issue and some do not, but all are premised on the long-standing rule that class actions are not governed by the jurisdictional rules applicable to individual cases. Because the number of such cases makes it impractical to cite them all in the body of this brief a sampling of multi-state class actions conducted without the limitations of normal jurisdictional principles is set forth in Appendix A. Multi-state

class actions exist only because the courts have consistently refused to subject absent class members to the jurisdictional rules applicable in individual cases. This Court, in particular has never required class actions to meet the jurisdictional requirement imposed on individual actions and has rejected time and again the very principle that Phillips here espouses. In 1877 this Court established the principle that due process imposed territorial limits on a forum court in adjudicating an individual action. *Pennoyer v. Neff*, 95 U.S. 714 (1877). Under *Pennoyer*, a court could exercise personal jurisdiction over a defendant only if the defendant were "present" within the territorial limits of the forum state. Subsequently, in *Hartford Life Insurance Co. v. Ibs*, 237 U.S. 662 (1915), this Court upheld a state court class action judgment against the collateral attack of a non-resident who argued against the application of "full faith and credit". Despite the assertion of *Pennoyer* by the non-resident, this Court did not even discuss *Pennoyer*'s jurisdictional requirements. In upholding jurisdiction this Court instead relied on three elements. First, the case involved a representative or class action. "A court of equity permits a portion of the parties in interest to represent the entire body and the decree binds all . . . as if all were before the court." *Id.*, at 672. Second, the defendant insurance company was subject to the jurisdiction of the court which rendered the judgment. Third, if the state court had not determined the rights of the entire class and the litigation were fragmented before the courts of various states, it would have exposed the litigants to conflicting duties and obligations. "It would have been destructive of their mutual rights . . . to use the . . . fund in one way as to claims of members residing in one state and to use it in another way as to claims of members residing in a different state." *Id.* at 670-671.

This Court also reaffirmed the non-applicability of the jurisdictional principles of individual law suits to class actions in collateral suits by non-resident plaintiffs who sought to avoid full faith and credit by urging the application of *Pennoyer*, and did so without discussing the jurisdictional requirements of *Pennoyer*, in *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915); *Hartford Life Insurance Co. v. Barber*, 245 U.S. 146 (1917); *Sovereign Camp of the Woodmen of the World v. William F. Bolin*, 305 U.S. 66 (1938). Subsequently, in *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court reviewed its prior holdings and said that class suits were appropriate where some of the class members were ". . . not within the [normal] jurisdiction . . ." of the court. *Id.*, at 41. And in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), a suit to settle the accounts of a trustee, this Court again rejected a contention that a state court could not determine the rights of absent class members because they resided beyond its normal territorial jurisdiction. Again, the Court focused on the fact that there is a need to completely determine the rights of all absent class members in one lawsuit and again rejected *Pennoyer*'s tests of jurisdiction.*

* Despite arguments on collateral attack that *Pennoyer* prevented jurisdiction, none of the Supreme Court cases even investigate whether jurisdiction could be based on the *Pennoyer* requirements. Although some of these cases mention a common fund, this was not and has never been a basis of jurisdiction. In all of these cases the class action determined personal rights, not possible under *in rem*, and in none of them did this Court discuss *in rem* jurisdiction. Thus, class actions approved by this Court determined whether the policyholders' certificates could be amended to require continued payments after 20 years (*Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66 (1938)); or whether the policyholder could be required to pay increased assessments (*Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921); *Royal*

(Footnote continued on following page)

More recently, this Court reviewed a collateral attack on the class action judgment of an Indiana state court personally binding a nationwide class of insurance policyholders. *Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691 (1982). While the issue was not directly raised, this Court upheld the state court class action despite the fact that non-residents without minimum contacts were bound.

Like the state courts, the federal courts regularly conduct class actions with out-of-state class members without "minimum contacts" with the forum and this Court's state court class action holdings are the basis. In *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), this Court rejected a collateral attack on a class action conducted in a federal district court. On review, this Court held that *Pennoyer* did not preclude a class action judgment binding on non-resident class members and that federal diversity jurisdiction had been properly exercised concluding that ". . . *a class suit of this nature might have been maintained in a state court and would have been binding on all of the class* . . ." Id. at 366 (emphasis added). 3B Moore's Federal Practice ¶ 23.11[5], at 232893. *See also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

While Phillips tries to avoid the point, the logic of its assault on the state court class action would apply equally to the federal courts. The federal as well as the state

* *continued*
Arcanum v. Green, 237 U.S. 531 (1915)); whether insurance company management was liable and whether assessments were too high (*Hartford Ins. v. Barber*, 245 U.S. 146 (1917); *Hartford Ins. v. Ibs*, 237 U.S. 662 (1915)) and whether the trustee was liable for breach of trust (*Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950)). Nor would *in rem* jurisdiction have necessitated adequate representation as the Court required.

system is subject to due process. Although the Due Process Clause applicable to the federal system is found in the Fifth rather than the Fourteenth Amendment, there is no basis for different treatment with respect to the issues here. If a Kansas class action would unreasonably impose on the civil liberties of an Oklahoma citizen, by "haling" him before a Kansas court that citizen would be no less deprived if the adjudication were conducted by a federal court sitting in Kansas.*

In the many multi-state class actions which have come before it, this Court has never required that non-resident class members satisfy the test for personal jurisdiction in individual cases. And the long established practice of the lower courts, both state and federal, overwhelmingly demonstrate that normal jurisdictional principles do not apply. Surely the number of multi-state class actions conducted without applying principles of jurisdiction routinely applied in individual cases could not have been a mere oversight on the part of the courts.

B. The Minimum Contacts Test Urged By Phillips Would Prevent The States From Adjudicating Multi-State Problems Requiring Class Treatment And Destroy Procedures Essential To The States' Administration Of Justice.

Throughout the course of this century, multi-state class actions have been used to solve a variety of problems essential to the administration of the state system of

* Although Congress has authorized nationwide service of process in certain specific federal question cases, this has no bearing on the issue. The acts of the federal government like those of the states must comply with the requirements of due process. If the exercise of jurisdiction over non-resident class members did in fact infringe the rights of class members residing outside the forum the fact that it was authorized by Congress would not save it from being unconstitutional.

justice. These lawsuits have been initiated both by multi-state enterprises against multi-state classes and by multi-state classes against multi-state enterprises. The application of the "minimum contacts" test to absent class members would eliminate these multi-state class actions. Normally the absent class members have not come to a single forum to participate in the transaction giving rise to the lawsuit, but instead a multi-state enterprise comes to the various states of class member residence to conduct business. Thus, the entire class will not have "minimum contacts" with any one state and application of that test would require a multiplicity of piecemeal lawsuits.

An examination of some of the multi-state class action cases which have come before this Court will demonstrate the point. In the insurance industry (see, e.g., *Sovereign Camp of the Woodmen of the World v. William F. Bolin*, 305 U.S. 66 (1938); *Underwriters National Assurance Corp. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691 (1982); *Carpenter v. Pacific Mutual Life Insurance Co.*, 10 Cal. 2d 307, 74 P. 2d 761 (1937), *aff'd sub nom. Neblett v. Carpenter*, 305 U.S. 297 (1938); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915)) the nationwide policyholders purchase their policies from local agents and have no contact with one forum.* They would not expect to be "haled" before a foreign court and would not satisfy the

* Although Phillips and its Amici suggest that all of the class members have "minimum contacts" with Oklahoma (Phillips base of operation) and that an Oklahoma Court could therefore conduct the nationwide class action, this is incorrect. While Phillips is based in Oklahoma, Phillips maintains field agents for conducting leasing transactions and the royalty owners did not come to Oklahoma to negotiate the leases with Phillips. The contact of the Defendant Phillips with the forum does not satisfy any test requiring "minimum contacts" of the Plaintiffs with the forum.

"minimum contacts" test. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980). The same is true of the settlement of a trustee's account against non-resident trust beneficiaries. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Non-resident beneficiaries generally acquire their interest by the act of a grantor or testator, and they have no "minimum contacts" with one forum state. While these suits cause none of the problems hypothesized by Phillips, application of the "minimum contacts" test would prevent the conduct of national class actions such as these which this Court has upheld.*

While some multi-state enterprises like Phillips and its amici would hope to deprive absent class members of their day in court by the application of the "minimum contacts" test, the same test would impose an enormous burden on litigation initiated by them when they sought relief from a national class. If class actions are to be subject to territorial limitations where a multi-state class seeks relief from a multi-state enterprise, these limitations must also apply when a multi-state enterprise seeks relief from such a class. The result cannot depend on whether the relief

* In *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W. 2d 879 (1978), a nationwide company was sued by a class of employees alleging breach of contract in connection with a pension program. The company unsuccessfully urged application of the "minimum contacts" test despite the fact that the case raised none of the problems hypothesized by Phillips. Application of that test would have required simultaneous class actions in at least 21 states. 271 N.W. 2d at 885. One must suspect that had the company sought relief from its employees it would not have urged application of the "minimum contacts" test. A review of other examples of multi-state class actions cited in Appendix A demonstrate that even though these cases cause none of the problems hypothesized by Phillips, they could not have been adjudicated under the "minimum contacts" test.

is sought by or against the enterprise. The "minimum contacts" test cannot be used to accomplish, and the Equal Protection Clause does not permit, such a result.

Destruction of the multi-state class action would cause enormous harm to the legitimate interests of the states and their courts. The state courts would be required to conduct fifty identical lawsuits to accomplish the kinds of adjudications which have always been completed in one court. Multiplying the number of lawsuits would place a staggering burden on the state system. The specter of fifty state court judges and counsel for the plaintiffs and defendants simultaneously conducting 50 fragments of the same litigation and 50 courts simultaneously conducting discovery with the same defendant is invoked in the name of due process. Obviously the states are simply not able to bear such a burden and the states would be prevented from resolving essential lawsuits; lawsuits which only the states can resolve; which can only be resolved by a multi-state class action and which this Court has consistently approved. In the judicial history of this country there is no instance of the state courts adjudicating multi-state disputes through the implementation of fifty class actions to resolve the same matter.

Even if the state court system could conduct fifty lawsuits to conclude one litigation, fragmenting the same suit would frustrate other significant state interests. The very purpose of class actions is to free the litigants from the conflicting adjudications of multiple lawsuits. See, e.g., Fed. R. Civ. P. 23(b)(1)(A); Advisory Committee Notes, Rule 23, 39 F.R.D. 73, 100-02 (1966); Ill. Rev. Stat. ch. 110 §57.2(4); Historical and Practice Notes, S.H.A. ch. 110 §57.2, at 135 (Supp. 1981). Requiring a multi-state enterprise to go through fifty adjudications would surely subject such an enterprise to conflicting standards of conduct.

Furthermore, the state which serves as a forum for non-resident claims is serving the interest of resident plaintiffs whose ability to get a day in court is dependent on the aggregation of claims of residents with those of non-residents. The burden of conducting fifty class suits is not one that could normally be borne by a major multi-state enterprise, let alone a class of small claimants lacking the concentration of economic power of such an enterprise. *See, e.g., Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980); *Hawaii v. Standard Oil of California*, 405 U.S. 251, 266 (1972). The "minimum contacts" test would defeat the ability to aggregate claims necessary to support such an adjudication.

Significantly Phillips has not asserted that similar limitations be placed on the federal courts' conduct of the multi-state class action. Phillips is suggesting, however, that this Court impose burdens on the state court system which would be unthinkable in the federal system where the federal courts have consistently conducted multi-state class actions without minimum contacts.

The ability of the federal courts to fully adjudicate one matter in one litigation has been given great importance, not only in class actions, but in individual actions as well. For example, in order to protect the state courts against the intrusion of federal courts in state matters, Article III of the Federal Constitution expressly imposes subject matter limitations on the federal courts. Despite this express prohibition, when a state issue arises out of the same matter as a federal cause of action, in the interest of having the entire matter completely adjudicated in one lawsuit, this Court has permitted the federal courts to adjudicate both the federal and state issues. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Osborne v. Bank of the United States*, 22 U.S. 737 (1824). It has been said that without this power "a court of original jurisdiction could not function". Wright, *Handbook of the Law of the Federal Courts* 72 (3rd ed. 1976); see also, Shenkier, *Ensuring Access To Federal Courts: A Revised Rationale For Pendent Jurisdiction*, 75 Nw. L. Rev. 245 (1981).

Although Phillips and its Amici attempt to argue that the interests of the states are opposed to multi-state class actions, no state has filed an amicus brief or otherwise opposed the conduct of the Shutts litigation as a national class action. In fact, when this issue was last brought to this Court, in *Miner v. Gillette*, the Attorneys General of Illinois, Wisconsin, Mississippi, Vermont, Tennessee, Florida, Arizona, and Texas, filed an amicus brief in support of the national class.

Furthermore, like the federal courts' Rule 23, the states have routinely passed class action statutes without territorial restrictions. See Appendix B. And the state courts have conducted many multi-state class actions. See Appendix A. No state has ever adopted legislation seeking to curtail non-resident class actions or impose any territorial limitation on them. The states' interests which Phillips seeks to raise are not the interests of the states, but solely the interests of a private party seeking to deprive others of their day in court.*

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* Phillips has ground much of its argument upon the need to protect the sovereign rights of sister states. Due process is not, however, a vehicle for the protection of such rights. Neither the express words nor the history of its enactment supports such a contention. *See* Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. L. Rev. 1112 (1981). And as this Court recently has said:

> The restriction on state power described in *Worldwide Volkswagen Corp.*, however, must be seen as ultimately the function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause, itself, makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign

(Footnote continued on following page)

C. The Minimum Contacts Test Has No Application To Non-Resident Plaintiff Class Members And The Assertion Of Jurisdiction In The Absence Of Such Contacts Is Not A Deprivation Of Their Due Process Rights.

Under the pretext of "concern" for the due process rights of class members, Phillips and its Amici seek an unwarranted and unprecedented extension of the "minimum contacts" test to class actions. Far from protecting the rights of the non-resident class members, the imposition of the "minimum contacts" test would almost invariably deprive them of their day in court. This deprivation should not be justified on the pretext of protecting class members' due process rights.

The purpose of the "minimum contacts" test is the preservation of "individual liberties" by protecting a party from being "haled" before a court in a remote jurisdiction when such action is not justified by the party's reasonable expectation arising from its conduct. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694 (1982). This purpose has no application or relevance to class actions, and, significantly, neither the "minimum contacts" test nor any other test for individual jurisdiction has ever been applied or even suggested by this Court in any such collective action. The reason for this is that in an individual action, a party's presence is required, and, unlike a class action, no one stands in his stead. If a party does not appear, his interests will not be represented. Thus, in an individual action, under some circumstances, it may "offend traditional

* *continued*
power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the power of sovereignty . . . *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 703 n.10 (1982).

notions of fair play and substantial justice" to require an individual to appear in a remote forum.

But these circumstances simply do not obtain in class actions which, by definition, are conducted through class representatives. Absent class members are not themselves required or, in fact, permitted to appear or participate in the actions. Moreover, it makes no difference whether the absent class member resides within or without the forum state. The class members are not being "haled" before the court. Rather, their right to due process is protected by the class representative, obviating the need for their "minimum contacts" with the forum.

D. The Hypothetical Problems Suggested By Phillips And Its Amici Do Not Justify The Abolition Of The Multi-State Class Action Through The Imposition Of The Minimum Contacts Test.

Phillips and its supporting Amici have based their arguments against multi-state class actions on an apocalyptic vision of insoluble problems which they claim will arise if the "minimum contacts" test is not applied to future class actions. Their arguments are belied by over a century of successful multi-state class actions. If and when any such hypothetical problems arise, rather than eliminate the entire multi-state class action procedure, specific solutions should be employed.

1. Multi-State Class Actions Generally Do Not Require Application Of The Laws Of Numerous States And State Courts Are Not Incompetent Or Constitutionally Proscribed From Applying Such Laws When Required To Do So.

Phillips and its Amici argue that the Constitution requires that a state court in a multi-state class action must apply the laws of many foreign states and that such actions cannot proceed because of a state court's inability

to properly do so. However, it is not constitutionally necessary to apply the laws of multiple states in a class action. For example, while Phillips disputes the application of Kansas law to the entire class here, Phillips has conceded that the law of Oklahoma could be so applied. Surely the law of a state in which the Defendant is based could always be applied under the Constitution. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 306 (1981) and cases cited there. Furthermore, in the overwhelming majority of multi-state class actions it has not been necessary to apply the law of more than one state. (See the multi-state class actions upheld by this Court in Section A, *supra* and the cases cited in Appendix A hereto.) Modern choice of law rules give significant weight to the convenience of the court and the "simplification of the judicial task" is a significant consideration in the choice of law. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 306 (1981). The "grouping of contacts" approach used in *Oakes v. Chicago Fire Brick Co.*, 398 Ill. 474, 59 N.E. 2d 460 (1945) and *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W. 2d 879 (1978), permits the application of the laws of one state to actions based on contracts, while the position of the Restatement (Second) of Conflicts of Law §945(2) permits the application of the law of one state to tort actions.

Furthermore, Phillips suggests that state courts are not competent to apply the laws of other states, notwithstanding the fact that federal courts in diversity cases constantly determine and apply the laws of the various states. This argument is totally inconsistent with the role of the state courts in an interdependent federal union, is wholly unwarranted, and is not one to which this Court should subscribe under principles of federalism. Furthermore, in individual actions state courts routinely apply the laws of other states and there is no constitutional basis for preventing state courts from doing so in collective litigation.

Phillips also theorizes that the Constitution requires the application of the law of each state of a class member's residence to that class member's claim, that under the Constitution those states have some new form of exclusive jurisdiction to determine matters arising under their laws, that the forum court cannot make decisions under the law of the class member's state and therefore cannot entertain any class action involving non-resident plaintiffs. This theory is simply at odds with established constitutional precepts. *See Allstate Insurance Co. v. Hague*, 449 U.S. 302, 306 (1981) regarding the construction of an insurance policy (which is subject to state regulation*) and cases cited there. *See also, Underwriters National Assurance Corp. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691 (1982). No federal union could operate under such a principle; ours does not now, and it should not be required to do so in the future.

Furthermore, Phillips argument does not justify the application of the "minimum contacts" test to class actions. Requiring "minimum contacts" would have eliminated the non-resident class members in *Hartford v. Ibs* and *Mullane v. Central Hanover* for a few examples, even though the conduct of those cases contravened none of the choice of law policies urged by Phillips. (See also cases in Section A, *supra*, and in Appendix A.)

Moreover, the "minimum contacts" test would not prevent a forum court from adjudicating matters under the laws of the state of residence when the class members

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* Phillips and its Amici appear to base some of their arguments on their assertion that class actions are "regulatory". Insofar as all lawsuits and all rules of law regulate the conduct of citizens all of them are regulatory. And the use of the label "regulatory" is no justification for applying different constitutional choice of law principles here.

consented to participate in a forum court's adjudication. On the other hand, "minimum contacts" would prevent the adjudication of a multi-state class action even though constitutional conflicts principles did in fact permit application of the forum's own laws.*

Whether or not there could be circumstances justifying exclusive jurisdiction has no relevance here. At such time as this Court determines that exclusive jurisdiction is constitutionally required and a class action which would contravene this determination is before the Court, then, at that time, specific solutions should be imposed. This is no reason to destroy an essential procedure which has absolutely no relation to the hypothetical problems posed.

2. The Contention That Insoluble Conflicts Will Arise Between The States Is Belied By The Long History Of The National Class Action, And Could Not Form A Constitutional Basis For Its Destruction.

Phillips and its Amici argue that the national class action will result in insoluble conflicts between the states and that this justifies its destruction by the imposition of the "minimum contacts" test. It does not. National class actions, without territorial limitations, have been conducted in both state and federal courts since the beginning of this century. They have not generated insoluble conflicts, and no insoluble conflict has arisen with respect to the *Shutts* case itself. Nor do those who propose its

* Phillips and its Amici also argue that destruction of the national class action is necessary to eliminate forum shopping. Whenever the Constitution permits the choice of more than one law, all counsel will consider the impact of the forum on the choice of law in the case. There is no greater need, however, to go beyond normal constitutional choice of law principles in class actions, as Phillips argues, than there is in individual actions.

destruction suggest why the conflicts which may someday arise will be insoluble. Problems and conflicts are an inherent part of any legal system. In the federal system, there are conflicts among the circuits and within the circuits. In the state system there are conflicts among the courts of the sister states and among the courts within each state. If the mere existence of problems or conflicts justified the elimination of useful legal procedures, it is difficult to envision how our court systems could operate. Rather than eliminating an essential legal procedure, specific solutions are found on a case by case basis. Destroying the multi-state class action because of such potential conflicts would be to throw the "baby out with the bathwater".

It is suggested by Phillips and its Amici that non-resident class action judgments will not be honored by other states. However, this Court has regularly solved this supposed problem by requiring the sister states to give full faith and credit to national class action judgments. (*See Hartford Ins. v. Ibs, Hartford Ins. v. Barber,* and other cases cited in Section A *supra.*)

E. A State Court Which Is Conducting A Valid Class Action With Jurisdiction Over The Defendant Has The Greatest Interest In The Litigation And Is Not Prevented By The Constitution From Rendering A Complete Adjudication Including Non-Resident Class Members.

Phillips seems to suggest that if "minimum contacts" for the non-resident class members is not required, then this Court should still prevent the forum court from rendering a complete adjudication binding all class members unless the forum is the state with the greatest relationship to the activities giving rise to the suit. This

position has no basis in the Constitution of this country.* So long as the state court has jurisdiction over the defendant, it has the obligation to provide a complete determination. The absent class members' due process rights are not offended by and do not depend on the contact of the defendants or the underlying transaction with the forum. (See Section C *supra.*) The defendant's due process rights are fully protected if normal jurisdictional principles are applied to it. No greater contact or "nexus" is required by the Constitution.

Although this Court's decision must turn only on the requirements of the Constitution, Phillips' contention is also lacking in sound judicial policy. (See discussion in Section B *supra.*) This is borne out by the federal experience where, subject to normal rules of *forum non conveniens* and venue, the federal courts have found it essential to conduct nationwide class actions where the forum court has no superior relationship to the underlying transaction. *See, e.g., Appleton Electric v. Advance-United Expressways*, 494 F.2d 126 (7th Cir. 1974); *Philadelphia v. Morton Salt*, 248 F. Supp. 506 (E.D. Pa. 1965); *In re Antibiotic Antitrust Action*, 333 F. Supp. 299 (S.D.N.Y. 1971) *mandamus denied sub nom., Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971); *Califano v. Yamasaki*, 442 U.S. 682 (1979). The Constitution imposes no greater impediments on the state system.

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* Phillips appears to be relying on the fact that in such cases as *Hartford Life Ins. Co. v. Ibs*, the insurers principal place of business was the forum state. However, in that case the reason this Court ruled that non-resident class members were bound was that, like the federal courts need for pendent jurisdiction, it was essential for the state courts to conduct a complete determination in one lawsuit. The fact that the state court was the defendant's principal place of business was not the basis of the court's ruling that it had jurisdiction over the plaintiff class members.

II.

THIS COURT SHOULD NOT ADDRESS THE REQUIREMENT OF NOTICE NECESSARY TO SATISFY DUE PROCESS IN MULTI-STATE CLASS ACTIONS.

This Court should not address the question of what notice is necessary to satisfy due process in multi-state class actions. Individual notice was provided in the trial court to all identifiable class members by first class mail at the outset of the lawsuit. This clearly satisfies any notice which might be thought to be required by due process. Therefore, any discussion of this Court stating that such notice is in fact a constitutional requirement would be *obiter dictum.* Furthermore this was not the issue upon which the Petition for Certiorari was granted, and has no relation to the issue of a multi-state class action. A class member's needs for and entitlement to notice would not depend on whether the class member lived within or without the forum state. Because this issue has not been addressed by the parties, was not an issue in the court below, has an insufficient factual basis in the record, and is of overwhelming importance to the future of collective adjudications, it is respectfully submitted that this Court should not attempt to articulate the due process requirements of notice in this case.

Because of the importance of the issue, and the uncertainty as to whether this Court will, in fact, address it, Amicus will briefly discuss notice. Because of its expense, (often in excess of $1.00 per class member) requiring individual mailed notice in large class actions at the outset of the litigation, would often terminate the litigation and deprive class members of a day in court. *See* Dam, "*Class Action Notice: Who Needs It?*", 1974 Sup. Ct. Rev. 97, 121-126; 7A C. Wright & A. Miller, *Federal Practice and Procedure*, §1786 (1972 & Supp. 1982).

Persons whose rights are determined are not always entitled to a hearing. Where determinations affect numerous similarly situated persons, "traditional notions of fair play" do not always require that every such individual be afforded a personal hearing. *Compare Bi-Metallic Co. v. Colorado*, 239 U.S. 441 (1915), *with Londonor v. Denver*, 210 U.S. 373 (1908). Class actions in particular are not intended to permit individual hearings but to provide aggregate adjudications based on proper representation. If the class is adequately represented, there is no constitutional requirement of individual hearings. *Hansberry v. Lee*, 311 U.S. 32 (1940). Where, however, representation is questionable, notice is constitutionally required but only to assure adequate representation. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950). The purpose of notice is to assure representation rather than to provide a personal day in court for each recipient.* 3B *Moore's Federal Practice*, Par. 23.72 at 23-486 & 23-487, (1978 & Supp. 1982). *See also*, Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 314 (1973).

If notice is required to assure adequate representation, the Constitution does not require pre-trial notice to be mailed to each identifiable class member, but only a sufficient number "likely to safeguard the interests of all".

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* In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the class was not represented by a similarly situated person, but by a public official with no stake in the outcome. Notice was not a practical impediment to the conduct of the action. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), is based on a statutory interpretation rather than the Constitution. 3B *Moore's Federal Practice* Par. 23.72 at 23-486 & 23-487 (1978 & Supp. 1982); 7A C. Wright and A. Miller, *Federal Practice and Procedure*, Civil §1786. In most of the class actions passed on by this Court class members have not received pre-trial notice. See cases cited in Section A, *supra*.

Mullane v. Central Hanover Bank & Trust, 339 U.S. at 319. Properly done publication or any procedure likely to reach a cross section of class members sufficient to elicit representation from varying elements complies with the Constitution when necessary to secure representation. Furthermore, if individual notice is to be given under a statute permitting opt out, it should be deferred until evidence has established who should bear the expense. If a defendant seeks individual pre-trial notice to all identifiable class members in order to obtain the protection of requiring the class members to exercise their option before a determination has been reached, then notice is for the protection of the defendant, and defendant should bear its cost. *See* Dam, "*Class Action Notice: Who Needs It?*", 1974 Sup. Ct. Rev. 97, 121-126. Requiring individually mailed pre-trial notice to all class members will simply deprive them of their day in court.

Notice is not only an important, but also a complex issue. *See* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313 (1973). This is not a proper case for a determination regarding this issue. Amicus respectfully requests that this Court not address the issue of notice.

CONCLUSION

For the foregoing reasons and each of them, Amicus, the Consumer Coalition, respectfully requests that this Court deny the request of Phillips Petroleum Company to apply the "minimum contacts" test to state court class actions, and permit the state courts, along with the federal courts, to continue to conduct multi-state class actions.

Respectfully submitted,

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APPENDIX A

MULTI-STATE CLASS ACTIONS IN STATE COURTS

Vann v. *Hargett*, 22 N.C. 31 (1838).

Gibson v. *American Loan & Trust Co.*, 12 N.Y.S. 444 (1890).

Crane v. *Crane*, 105 S.W. 370 (Ct. App. Ky. 1907).

Guffanti v. *National Surety Co.*, 196 N.Y. 452, 90 N.E. 174 (Ct. App. 1909.)

National Surety Corp. v. *Nontz*, 262 Ky. 413, 90 S.W.2d 385 (1936).

Carpenter v. *Pacific Mutual Ins. Co.*, 10 Cal.2d 307, 74 P.2d 761 (1937), *aff'd sub nom.*, *Nebleti* v. *Carpenter*, 305 U.S. 297 (1938).

Taylor v. *Pacific Mutual Life Ins. Co.*, 214 N.C. 770, 200 S.E. 882 (1939).

Anglo-Continentale Trust Maatschappij v. *Allgemeine Elektricitaets-Gesellschaft*, 171 Misc 714, 13 N.Y.S.2d 397 (1939).

Larson v. *Pacific Mutual Ins. Co.*, 373 Ill. 614, 27 N.E.2d 458 (1940).

San Francisco v. *Market St. Ry. Co.*, 95 Cal.2d 248, 213 P.2d 780 (1950).

Kimbrough v. *Parker*, 344 Ill. App. 483, 101 N.E.2d 61 (1st Dist. 1951).

Moser v. *Keller*, 303 S.W.2d 135 (1957).

Chance v. *Superior Court of Los Angeles County*, 23 Cal. Rptr. 761, 373 P.2d 849 (S. Ct. Cal. 1962).

Cocke v. *Duke University*, 260 N.C. 1, 131 S.E.2d 909 (1963).

Holstein v. *Montgomery Ward & Co.*, CCH Pov. L. Rep. ¶9,052 (1968-71 Transfer Binder) at 10,783 (Illinois Circuit Court, 1969).

Metowski v. *Traid Corp.*, 28 Cal. App.3d 332, 104 Cal. Rptr. 599 (1972).

Paley v. *Coca-Cola Co.*, 389 Mich. 983, 209 N.W.2d 232 (1973).

Horst v. *Guy*, 211 N.W.2d 723 (S. Ct. N.D. 1973).

Cooper v. *American Savings & Loan Assn.*, 127 Cal. Rptr. 579, 55 Cal. App.3d 274 (1976).

Shutts v. *Phillips Petroleum Co.*, 567 P.2d 1292 (S. Ct. Kan. 1977).

Van Vactor v. *Blue Cross Assoc.*, 50 Ill. App.3d 709, 365 N.E.2d 638 (1977).

Steinberg v. *Chicago Medical School*, 69 Ill.2d 320, 371 N.E.2d 634 (1977).

Nix v. *Northern Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1322 (S. Ct. Kan. 1977).

Maddox v. *Gulf Oil Co.*, 222 Kan. 733, 567 P.2d 1326 (S. Ct. Kan. 1977).

Sterling v. *Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (S. Ct. Kan. 1977).

Frank v. *Teachers Insurance & Annuity Assoc.*, 71 Ill.2d 583, 376 N.E.2d 1377 (1978).

Schlosser v. *Allis-Chalmers Corp.*, 86 Wis.2d 226, 271 N.W.2d 879 (1978).

Gray v. *Amoco Production Co.*, 573 P.2d 1080 (S. Ct. Kan. 1978).

Sterling v. *Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 635 (S. Ct. Kan. 1978).

Hoover v. *May Dept. Stores Co.*, 62 Ill.App.3d 106, 378 N.E.2d 762 (1978), *rev'd and remanded on other grds*, 77 Ill.2d 93, 395 N.E.2d 541 (1979).

Stern v. *Carter*, 97 Misc. 2d 775, 412 N.Y.S.2d 333 (S. Ct. Kings Cty, 1979).

Mercury Records Productions, Inc. v. *Economic Consultants, Inc.*, 91 Wis.2d 482, 283 N.W.2d 613 (1979).

Geelan v. *Pan American World Airways*, 441 N.Y.S. 474, 83 A.D.2d 538 (1980).

Clark v. *Harris*, 76 Ind. Dec. 767, 406 N.E.2d 646 (1980).

MULTI-STATE CLASS ACTIONS IN FEDERAL COURTS

Smith v. *Swormstedt*, 57 U.S. (16 How.) 288 (1853).

Supreme Tribe of Ben Hur v. *Cauble*, 255 U.S. 356 (1921).

Smith v. *Board of Pensions of the Methodist Church, Inc.*, 54 F. Supp. 224 (E.D. Mo. 1944).

Advertising Specialty National Association v. *Federal Trade Commission*, 238 F.2d 108 (1st Cir. 1956).

Calagaz v. *Calhoon*, 309 F.2d 248 (5th Cir. 1962).

Philadelphia Electric Company v. *Anaconda American Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968).

State of West Virginia v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971).

Siegel v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971).

Research Corp. v. *Edward J. Funk & Sons, Co., Inc.*, 15 F.R.Serv. 2d 580 (N.D. Ind. 1971).

In re Antibiotic Antitrust Actions, 333 F.Supp. 299 (S.D. N.Y. 1971) *Mandamus denied sub nom., Pfizer, Inc.* v. *Lord*, 447 F.2d 122 (2d Cir. 1971).

Rivera v. *Chicken Delight, Inc.*, 17 F.R.Serv. 2d 473 (S.D. Tex. 1973).

Theriault v. *Carlson*, 353 F.Supp. 1061 (N.D. Ga. 1973).

Coburn v. *4-R Corp.*, 77 F.R.D. 43 (E.D. Ky., 1977).

Aznavorian v. *Califano*, 440 F.Supp. 788 (S.D. Cal. 1977), *rev'd on other grds.*, 439 U.S. 107 (1978).

In Re: Gap Stores Securities Litigation, 79 F.R.D. 283 (N.D. Cal. 1978).

In Re: "Agent Orange" Products Liability Litigation, 506 F.Supp. 762 (E.D. N.Y.), *rev'd on other grds*, 635 F.2d 987 (2d Cir. 1980).

United States v. *Will*, 449 U.S. 200 (1980).

McClure v. *Harris*, 503 F.Supp. 409 (N.D. Cal. 1980).

APPENDIX B

STATE CLASS ACTION STATUTES

Alabama:	Ala. R. Civ. P. 23.
Alaska:	Alaska R. Civ. P. 23.
Arizona:	Ariz. R. Civ. P. 23.
Arkansas:	Ark. R. Civ. P. 23-23.2.
California:	Cal. Code. Civ. Pro. §382.
Colorado:	Colo. R. Civ. P. 23.
Connecticut:	Ct. Gen. Stat. §52-104-105.
Delaware:	Del. Ch. R. 23.
District of Columbia:	D.C. R. Civ. P. 23-23-I.
Florida:	Fla. R. Civ. P. 1.220.
Georgia:	Ga. Code §81A-123.
Hawaii:	Hawaii R. Civ. P. 23.
Idaho:	Idaho R. Civ. P. 23.
Illinois:	Ill. Rev. Stat. Ch. 110 §57.2-7.
Indiana:	Ind. R. Tr. P. 23.
Iowa:	Iowa R. Civ. P. 42.
Kansas:	Kan. Stat. §60-223.
Kentucky:	Ky. R. Civ. P. 23.
Louisiana:	La. Code Civ. Pro. Art. 591.
Maine:	Me. R. Civ. P. 23.
Maryland:	Md. Code Rule 209.
Massachusetts:	Mass. R. Civ. P. 23.

Michigan:	Mi. Stat. Gen. Ct. Rule 208.
Minnesota:	Minn. R. Civ. P. 23.
Missouri:	Mo. Rev. Stat. §507.070.
Montana:	Mont. R. Civ. P. 23.
Nebraska:	Neb. Rev. Stat. §25-319.
Nevada:	Nev. R. Civ. P. 23.
New Hampshire:	Common Law
New Jersey:	N.J. Civ. Prac. Rule 4:32.
New Mexico:	N.M. Stat. §21-1-1, §21-6-1.
New York:	N.Y. Civ. Prac. Law §901-909.
North Carolina:	N.C. Gen. Stat. §1A-1 R. Civ. P. 23.
North Dakota:	N.D. R. Civ. P. 23.
Ohio:	Ohio R. Civ. P. 23.
Oklahoma:	12 OK Stat. Ann. §13-18.
Oregon:	Or. Rev. Stat. §§13.210-.410.
Pennsylvania:	Pa. Rule Civ. P. 1701-1716.
Rhode Island:	RI. R. Civ. P. 23.
South Carolina:	South Carolina Code §10-204.
Tennessee:	Tenn. R. Civ. P. 23.
Texas:	Tex. R. Civ. P. 42.
Utah:	Utah R. Civ. P. 23.
Vermont:	Vt. R. Civ. P. 23.
Washington:	Wash. Ct. Rules, Rule 23.
West Virginia:	W.V. R. Civ. P. 23.
Wisconsin:	Wis. Stat. §260.12.
Wyoming:	Wyo. R. Civ. P. 23.

No. 84-233

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Kansas

REPLY OF PHILLIPS PETROLEUM COMPANY

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REPLY OF PHILLIPS PETROLEUM COMPANY[1]

I. PHILLIPS HAS STANDING TO QUESTION THE APPROPRIATENESS OF KANSAS ASSERTING JURISDICTION OVER UNNAMED NONRESIDENT CLASS MEMBERS WHO HAVE NO AFFILIATION WITH THE FORUM

Contrary to the respondents' assertion, Phillips clearly has the requisite standing to challenge the Kansas court's assumption of jurisdiction over those class members who have no contacts with Kansas. By allowing an action that legitimately could be brought only on behalf of a few hundred people to be bloated to include 28,100 class members, the court below has exposed Phillips to a liability far beyond its power. This amounts to a direct violation of defendant's rights of such magnitude that Phillips has the unquestionable standing to challenge it before this Court. Independently, the circumstances of this case allow Phillips to advocate the rights of the absent class members.

A litigant certainly has the right to challenge the propriety of the parties arrayed against it. Thousands of persons beyond the jurisdictional reach of the court below have been swept up in this action by that court and have been awarded judgment against Phillips. The burden of litigating these claims and the dimension of the resulting liability Phillips faces provides Phillips with a "personal stake" in the outcome of the controversy. *Baker v. Carr*, 369 U.S. 186, 204 (1962).[2] This personal stake resulting from the harm caused by the Kansas court's actions gives Phillips the Article III

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[1] Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth at Pet. App. p. A68.

[2] The "personal stake" that Phillips has in this litigation should be contrasted with the "personal stake" a plaintiff, whose claim has been rendered moot, possesses in seeking reversal of a denial of class certification. That plaintiff, whose personal interests will be affected indirectly at best, has standing to litigate that case. *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980).

standing that enables it to contest Kansas' transgression of the Constitution's limits on state court jurisdiction and to clarify the extent of the judgment against it.[3] *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978).

In *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court went further and held that a defendant had the right to question a state's jurisdiction over a trustee who was a mere stakeholder, although an indispensable party under state law. Standing, in this context, is not premised on a defendant's concern for the rights of the absent plaintiffs, as the respondents erroneously suggest, but on a defendant's legitimate concern for its own rights. As the Court has said, standing exists whenever "any defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Id.* at 245, *quoting*, *Chicago v. Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 83 (1958).

A nonresident class member is undoubtedly an indispensable party to the adjudication of his own claim against Phillips[4] making the existence of a constitutionally sufficient jurisdictional base over him imperative.[5]

[3] If Phillips cannot challenge the court's jurisdiction over the nonresident class members, it never will have its day in court on the legitimacy of the resulting judgment inasmuch as no successful class member ever will raise the issue collaterally. This creates a lack of mutuality because a member of a losing class has such an incentive. Respondents' analogy to one-way collateral estoppel is false because in that situation the party against whom the estoppel is to run has had a full and fair opportunity on the issue in the first action.

[4] With respect to a nonresident's cause of action against Phillips, each nonresident has "not only . . . an interest in the controversy, but an interest of such a nature that a final decree cannot be made without . . . affecting that interest . . . ." *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1854).

[5] This concept has been incorporated into the Federal Rules of Civil Procedure. A defendant can move to dismiss for failure to join an indispensable party. Fed. R. Civ. P. 12(b)(7). The motion

Indeed, a judgment's effect on absent indispensable parties even can be questioned by a court on its own initiative. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968). Phillips plainly possesses a cognizable interest in whether the Kansas court can encompass nonresidents within its judgment.

Phillips is doing nothing more than raising traditional defenses of improper joinder of parties and improper class definition. The Kansas class action statute gives Phillips the right to litigate these questions. That statute requires the Kansas courts to find that a class action is superior to other means of resolving the controversy by considering "the interest of members of the class in prosecuting or defending separate actions . . ." and "the appropriate place for maintaining, and the procedural measures which may be needed in conducting a class action." Kan. Stat. Ann. § 60-223(b)(3)(A), (C).[6]

Not only can Phillips assert the constitutional violation of its own rights, Phillips also has standing to assert the liberty interests of nonresident class members. This Court has recognized that a defendant may advance the rights of third parties defensively as a bar to a judgment without encountering an Article III standing problem. *Warth v. Seldin*, 422 U.S. 490, 500 n.12 (1975). Any restraints applicable to standing to assert jus tertii arise not from the Constitution, but rather from the Court's own "rules of self governance." This Court repeatedly has upheld the standing of a party to assert the rights of others so as to avoid a harmful judicial determina-

even can be made by a defendant "seeking vicariously to protect the absent person against a prejudicial judgment . . . ." 1966 Advisory Committee Notes to Fed. R. Civ. P. 19, reprinted in 12 C. Wright & A. Miller, *Federal Practice and Procedure* 404 (1973). Kansas has an identical rule. Kan. Stat. Ann. § 60-212(b)(7).

[6] This statute is patterned after Federal Rule 23. That rule, like the Kansas statute, contemplates that a court will make the class action determination "with the aid of the parties." 1966 Advisory Committee Notes to Rule 23, reprinted in 12 C. Wright & A. Miller, *Federal Practice and Procedure* 416 (1973).

tion. The "rule of practice" limiting a party's ability to present another's interest is overborn "where there are weighty countervailing policies . . . ." *United States v. Raines*, 362 U.S. 17, 22 (1960).

The liberty interests of the nonresidents not to have their claims adjudicated by Kansas will be lost if the Court fails to consider this issue. It is absurd to believe that the right of absent class members to avoid an improper forum will be presented by the named class representatives or their counsel whose interests lie in maximizing the class's size. See *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980). The *only* party with an incentive to test the court's jurisdiction is the defendant.

There is no conflict between Phillips' interest in avoiding the assertion of jurisdiction by Kansas over the national class and the nonresidents' liberty interests in avoiding having their claims decided by the Kansas court.[7] Phillips certainly has enough incentive to advocate these absent class members' rights to insure that the constitutional question will be presented vigorously and fully for the Court's resolution. See *Craig v. Boren*, 429 U.S. 190, 194 (1976). The liability imposed on Phillips in the Kansas courts and its efforts throughout this controversy to litigate the jurisdiction question provides a basis for allowing Phillips to continue to advocate jus tertii before this Court. *Eisenstadt v. Baird*, 405 U.S. 438 (1971).

Moreover, a statute may grant a party the necessary basis for asserting the rights of third parties. *E.g.*,

[7] The respondents' position concerning standing seems to make it depend upon the outcome of the lawsuit. The respondents' argument that Phillips is without standing is premised on the idea that the class is completely victorious in this lawsuit. But a proper application of choice of law in this case could result in a portion of the class losing. This places the interests of Phillips, in avoiding the burden of litigation in Kansas, and the economic interests as well as the liberty interests of these class members in avoiding an adverse result in a forum with which the nonresident has no connection, in complete accord.

Warth v. Seldin, supra at 509; *Doe v. Bolton*, 410 U.S. 179, 188 (1979); *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). As discussed earlier, the Kansas class action statute contemplates that issues of joinder, jurisdictional location and other matters will be raised and litigated by defendants. *E.g., General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). Kansas repeatedly has permitted defendants to question the make up of the class arrayed against them by raising due process concerns. *E.g., Wortman v. Sun Oil Co.*, 236 Kan. 266, 690 P.2d 385 (1984); *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977) (*Shutts I*); *Gray v. Amoco Production Co.*, 1 Kan. App. 2d 338, 564 P.2d 579 (1977). The Kansas Supreme Court's apparent recognition of Phillips' right under Kansas law to raise these questions is binding on this Court to the extent it is based on Kansas law. See *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974).

The jurisdictional issue now before this Court has been decided inconsistently by a number of state courts. Usually, the defendants assert the rights of the nonresident class members to limit the size of the class. *E.g., Miner v. Gillette Co.*, 87 Ill. 247, 428 N.E.2d 478 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*, 459 U.S. 86 (1982); *Schlosser v. Allis-Chalmers Corp.*, 86 Wis.2d 226, 271 N.W.2d 879 (1978); *Feldman v. Bates Manufacturing Co., Inc.*, 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976). Unless this Court resolves this issue, confusion and uncertainty regarding both the jurisdictional power of state courts and the status of "national" class action judgments in other states will continue.[8] The pressing need to stabilize this burgeoning

[8] Resolution of this question will have a significant impact on a wide range of pending cases, including class actions in federal courts. *E.g., Jones v. Medtronic, Inc.*, Case No. CV-84-L-24555 (N.D. Ala.); *Linkous v. Medtronic, Inc.*, Case No. 84-1909 (E.D. Pa.) (conflicting nationwide product liability class actions). See also *In re Asbestos School Litigation*, Case No. 83-0268 (E.D. Pa.) (issue of jurisdiction over national diversity class raised and now on appeal to Third Circuit).

area of state court litigation, as well as the fact that it undoubtedly will be pressed on this Court in future cases, indicates that invoking the Court's limitations on the "assertion of jus tertii would 'serve no functional purpose.'" *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), *quoting*, *Craig v. Boren*, *supra* at 194.

In the past, this Court has permitted the use of third party standing when a state court has considered the issues raised. In this situation, a decision "to forego consideration of the constitutional merits in order to await the initiation of a new challenge . . . by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence." *Craig v. Boren*, *supra* at 193-94. See also *City of Revere v. Massachusetts General Hospital*, *supra*.

II. RESPONDENTS HAVE OFFERED NO JUSTIFICATION FOR DEVIATING FROM THE CONSTITUTIONAL LIMITS ON STATE COURT JURISDICTION ESTABLISHED BY THIS COURT

A. The Purported Differences Between an Unnamed Nonresident Plaintiff Class Member And A Nonresident Defendant Are Illusory And Not Constitutionally Significant

Respondents apparently concede that the Kansas court had no constitutional basis under *International Shoe* for asserting jurisdiction over the nonresident class members since they seek to uphold the decision below solely on the ground that an unnamed nonresident plaintiff class member occupies a "significantly different position" than a nonresident defendant. Three primary differences are mentioned. First, if a nonresident defendant fails to appear, he is faced with a default judgment. Second, a nonresident defendant faces the possibility that a coercive judgment will be enforced against him. Third, a nonresident defendant must obtain counsel in the forum. Respondents Brief p. 16. Phillips submits that these differences have no substance and do not justify ignoring

this Court's decisions establishing limits on state court jurisdiction. There simply is no constitutional basis for treating the claims possessed by class plaintiffs as a property right that is subject to any lesser protection than any other property. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

A nonresident defendant not subject to a court's jurisdiction does not risk having a *binding* default judgment entered against him. A nonappearing defendant always can raise the lack of jurisdiction as a collateral attack on the judgment. *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 30 (1917). Ironically, under the respondents' view, the nonresident class member who has no contacts with Kansas would be in a worse position than a nonappearing defendant because he could be bound by the Kansas courts even if he took no action with respect to the Kansas litigation.

Nor does the fact that class plaintiffs may not face coercive judgments provide a meaningful distinction. This Court never has limited due process protections only to those defendants who face "coercive court orders." Mere stakeholder defendants are protected, *Hanson v. Denckla*, *supra*, as well as defendants faced with the extinction of personal claims, *Estin v. Estin*, 334 U.S. 541 (1948), and defendants threatened with no direct economic impact. *Rush v. Savchuk*, 444 U.S. 320, 331 n.20 (1980). Even assuming that nonresident class members are not subject to coercive orders, an extremely dubious assumption,[9] there is no basis for exempting unnamed nonresident class

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[9] Respondents are incorrect in asserting that Kansas would not allow counterclaims against absent class members. Kansas has permitted claims by defendants in a class action to be offset against the amount of the final award. *Waechter v. Amoco Production Co.*, 217 Kan. 489, 537 P.2d 228 (1975); *Hemley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345 (1977). It is undecided whether a claim by a defendant that exceeds an award to a class plaintiff could result in a Kansas court entering a judgment against a plaintiff class member.

members from due process protections simply because they are labeled plaintiffs.

Finally, the claim that a nonresident defendant "invariably" is required to obtain counsel not only is incorrect factually, but also cannot support the constitutional distinction fabricated by the respondents. Since the right of a defendant to attack a default judgment collaterally is not impaired by a failure to appear, forum counsel is not always required. Moreover, the respondents' notion that the nonresident class members have not "retained" counsel ignores reality. Class certification is not possible unless the class is represented adequately, which universally is understood to mean having adequate counsel. Furthermore, in Kansas, nonresident plaintiffs have been compelled to compensate class counsel in an amount equal to between one-fourth and one-third of the class recovery. See Comment, *The Kansas Class Action Device*, 31 Kan. L. Rev. 305, 315-16 (1983). The fact that class members are provided with an attorney complete with a contingent fee arrangement does not justify a lesser constitutional standard of scrutiny.

B. Mere Notice, Representation And A Right To Opt-Out Cannot Cure The Total Absence Of A Constitutional Basis For Jurisdiction

Respondents devote a considerable portion of their brief to the argument that the class action procedures can be substituted for this Court's recognized limits on state court jurisdiction. Respondents refuse to recognize that the class action procedure is only a procedural device to achieve some litigation efficiency and economy. It should not be glorified above all else. The special procedural safeguards imposed on class actions are designed to compensate for the fact that it is a representative action that deprives the individual class member of his right to a formal day in court. These procedures are not a substitute for the constitutional requirement that there exist a basis for jurisdiction.

Traditionally, jurisdiction over a person has been analized in terms of two different elements—basis and process. Under this analysis:

> A court cannot exercise personal jurisdiction over a party unless a proper basis exists. Basis refers to the relationship between the party and the territory of the state from which the court's authority derives.

R. Casad, *Jurisdiction in Civil Actions* ¶ 1.01[2][a] (1983). This principle has been recognized in every decision of this Court since *Pennoyer v. Neff*, 95 U.S. 714 (1878). The approach of the court below and the respondents abandons any need for a basis on which to predicate the exercise of jurisdiction.[10] It allows mere notice to the class members and representation to bind nonresidents, even in the absence of any relationship between the forum and the nonresident, and in the face of this Court's unequivocal pronouncement that "all assertions of state court jurisdiction must be evaluated according to the standard set forth in *International Shoe* and its progeny." *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

The respondents' approach would permit Kansas to concoct a procedure for binding nonresidents having absolutely no connection to the forum. All that is necessary is to send nonresidents a letter informing them that a

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[10] This attitude is most obvious in the amicus brief of Public Citizen. Analyzing this case only in terms of the procedural safeguards case of *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Public Citizen brief blithely assumes no need for a basis for state court jurisdiction. *Mathews*, which dealt with the procedures that must be employed when a governmental agency is compelled to act, is totally inapposite. In *Mathews* the government interest "in conserving scarce fiscal and administrative resources," *id.* at 348, shaped the nature of the agency proceeding required. The agency's interest in carrying out its statutory mandate to administer the federal program of disability benefits required some action. Kansas has no corresponding interest that could justify *any* action by its courts with regard to the nonresident class members.

lawsuit has been commenced against them in a Kansas state court and that counsel has been appointed on their behalf. Everyone would agree that this procedure could not pass muster under any due process standard if applied to defendants. How then, can it be upheld when used by a volunteer to collectivize the claims of nonresidents and to assert them before an alien tribunal far, far away. The process is not made less offensive by giving the nonresident an opportunity to take affirmative action to avoid the adjudication.[11] The underlying fiction that silence—failing to opt-out—connotes consent simply cannot be constitutionally countenanced.

Allowing notice and representation to serve as a substitute for affiliating circumstances necessarily would undermine *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuck, supra*; *Kulko v. California Superior Court*, 436 U.S. 84 (1978), and *Shaffer v. Heitner, supra*.[12] This is not and cannot be the law. There is no case supporting it. Notice and representation do not address the constitutional concerns implicit in the jurisdictional basis requirement and do not even become relevant until the standards set forth in *International Shoe* and its progeny have been met.[13]

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[11] According to respondents' approach, Phillips could use the same procedure to initiate a nationwide class action against a class similar to that represented by the respondents in a forum of its choice to establish that the class had no right to interest.

[12] Neither *Hansberry v. Lee*, 311 U.S. 32 (1940), nor *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1854), support respondents. Neither case considered when a class action could proceed in state court absent a legitimate state interest. *Hansberry* involved class members who were residents of the forum state and land in the forum state. *Smith v. Swormstedt* concerned an adjudication by an Ohio federal court of rights to property of an Ohio corporation with its principal place of business in Ohio. In both cases, there was a basis for the courts adjudicating the claims.

[13] The respondents shore up their jurisdictional argument by relying on the "common fund" cases. But they cannot point to any "fund" in this case. As petitioner's earlier brief demonstrates, p. 21 n. 18, and respondents fail to challenge, this case involves nothing more than an aggregation of numerous individual contract claims, which offers no basis for asserting jurisdiction when it otherwise would not exist. Although *in rem* jurisdiction may have satisfied the basis requirement in the "common fund" cases when they were decided, today, this type of contact might not be sufficient to satisfy due process. See *Shaffer v. Heitner*, 433 U.S. 186 (1977).

Thus, the question is not merely a choice between two procedures—an opt-in or an opt-out class action—as respondents simplistically suggest. The question is whether a state court can entertain a nationwide class action in the absence of any constitutional basis for binding unaffiliated nonresident class members. Admittedly, this Court's precedents allow a nonresident plaintiff to consent to having her claim litigated in a state's court. *Keeton v. Hustler Magazine, Inc.*, —— U.S. ——, 104 S. Ct. 1473 (1984). But, it would be intolerable if one plaintiff were allowed to bring other nonresidents' claims before a court for adjudication and to bind those nonresidents on the basis of a "Book of the Month Club" type notice.[14] An attempt to bind nonresidents who remain inactive after receiving notice is jurisdiction predicated on nothing more than "unilateral activity" by self-appointed class representatives and their lawyers.[15] This has not been found constitutionally sufficient to bind an otherwise unaffiliated nonresident defendant. *Helicopteros*

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[14] An opt-in class action would avoid the constitutional question of whether a state can bind nonresidents who remain inactive after a notice is mailed to the nonresident. See Petitioner's Brief, p. 16 n. 13. At the time this action was filed, Oklahoma had an opt-in class action statute. That statute was replaced by an opt-out statute, effective November, 1984. Okla. Stat. tit. 12, § 2023.C.2.

[15] The "half-fiction" underlying the opt-out provision ignores the fact that silence is ambiguous and "can indicate either consent or objection." Kennedy, *Class Actions: The Right To Opt Out*, 25 Ariz. L. Rev. 3, 21 (1983). The advantage named plaintiffs possess under the assumption that silence connotes consent has been seen as "potential windfall leverage." *Id.*

Nacionales de Colombia, S.A. v. Hall, —— U.S. ——, 104 S. Ct. 1868, 1873 (1984). Requiring that unequivocal affirmative action be taken by nonresidents to submit to jurisdiction is not an unreasonable burden in the case of class members who are unaffiliated with the forum.

C. Recognizing That Jurisdictional Limits Are Applicable To Class Actions Will Not Destroy That Procedure

Notwithstanding the rhetorical and somewhat hysterical protestations of the respondents and the Amici supporting them, Phillips never has argued that the class action be abolished and its position would not lead to that. The alternative to this Kansas class action is not, as the respondents assert, either individual actions or 50 separate class actions. The constitutional possibilities include: (1) valid class actions in a handful of states (at most, those in which the gas leases are located) adjudicating the rights of class members affiliated with each of those states; (2) one class action in one forum that possesses a sufficient connection with the litigation under this Court's precedents that would permit the decision of all claims; or (3) adjudicating claims of those people who have a constitutionally significant connection with a forum state as well as the claims of any one else who affirmatively consents to that state's jurisdiction. Phillips' approach only negates a state's ability to adjudicate the claims of nonresident class members who have no nexus with the forum and have not affirmatively consented to participate.

Preventing state judiciaries from officiously intermeddling with the rights of unaffiliated nonresidents and disputes they have no legitimate interest in does not unduly limit the plaintiffs' ability to obtain meaningful redress.[16] Although this may deprive these plaintiffs of

[16] A defendant thus would not be able to "ignore their obligations" to "small claimants." Respondents Brief p. 14. However, a plaintiff's ability to shop for a forum that would expand the defendant's duties under the contract would be restricted.

greater leverage to bring about a favorable result or to increase the size of any attorney fees award, it does not affect any legitimate state interest. Rather, jurisdictional restraints should be seen as properly allocating judicial business among the states in a manner consistent with our federal system. Applying them undoubtedly will free nonresidents from the effects of adverse court decisions by states having no nexus with them and no legitimate interest in deciding their claims.

III. KANSAS CANNOT CONSTITUTIONALLY EXPORT ITS LAW BY APPLYING IT TO THOSE CLAIMS IN THIS CASE THAT HAVE NO RELATION TO KANSAS

The record shows that over 97.3 percent of the class members are nonresidents of Kansas,[17] and less than one quarter of one percent of the leases are located in Kansas, accounting for only .003 percent of the additional royalties. Pet. App. A9. Moreover, respondents' brief makes no attempt to show that there are any contacts that could create significant state interests to justify the application of Kansas law to the nonresidents or the non-Kansas property or contracts. Respondents totally fail to face up to the reality that this "Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981).

A. Kansas Law Is Inconsistent With Other Interested States' Law And Its Application To Phillips Was "Arbitrary" And "Fundamentally Unfair"

Instead of attempting to satisfy the prescribed tests for a constitutional choice of substantive law, the respondents argue that the Kansas law applied was of such

[17] The only dispute seems to be whether Kansas residents constitute 2.7 percent of the class (553 members), see Pet. App. A64, or 3.5 percent (1,000 members). See Respondent's Brief, p. 3.

transcendental fairness that the result should not be upset. Whether Kansas law has produced a result that the respondents deem "fair" is beside the point. The question before the Court is whether the Kansas court's choice of law was constitutional. Cf. *Allstate Ins. Co. v. Hague*, at 306 n.6. Moreover, the respondents' frequent references to generally accepted legal principles should not obscure the fact that the court below applied Kansas law to transactions that did not have the slightest relationship to Kansas.

Respondents argue that there are no conflicts between the result reached by the application of Kansas law and the results under other states' laws. This is absolutely wrong. Conflicts exist in at least three areas: (1) the court below held that certain transactions gave rise to an interest obligation when other states' law would lead to a contrary result; (2) universal application of the Kansas notion of equity has defeated the countervailing policies of other states; and (3) the use of Kansas law resulted in the exaction of interest at a much higher rate than would have occurred under other states' laws.[18]

1. *Kansas Imposed An Interest Liability On Transactions That Other States Would Hold Gave Rise To No Interest Obligation*

The unfairness of applying Kansas law is typified by the Kansas Supreme Court's treatment of a group of contracts between Phillips and gas producers.[19] The pric-

[18] The different outcomes noted by Phillips in its initial brief (pages 30-33), were summarily dismissed by the respondents as "collateral" and obfuscatory." This unwillingness to acknowledge the reality of differences in state law underscores an inherent problem in attempting to adjudicate individual claims as part of massive class actions—individually defined rights often are subordinated to the pressure to achieve a global resolution of all claims. The problem is magnified when the class action embraces claims from several states that might define the rights arising from even a single set of facts in substantially different ways.

[19] Phillips is both a producer and purchaser of gas. Phillips creates no new rights in royalty owners simply by purchasing gas

ing provision of these contracts specifically provides that payment of the so-called suspense amounts are not due before the rate increases become final, and that no interest is due on those amounts.[20] These contracts were held by the Kansas Supreme Court to be ineffective to *relieve* Phillips of an obligation to pay interest on "suspended" royalties. Other states in these circumstances would find that no obligation ever arose requiring Phillips to pay interest to royalty owners. The Texas Supreme Court has noted that gas purchase contracts could be written in just the manner these contracts were written to avoid liability for interest to the producer. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 484 (Tex. 1978). The application of Kansas law to these contracts created a liability that Phillips' contracts expressly negated. The respondents' brief totally fails to address the fact that basic notions of due process and full faith and credit prevent Kansas from invalidating contractual relationships between noncitizens of Kansas about matters having nothing to do with Kansas.

In the same vein, other involved states apparently would not find that Phillips is equitably liable for interest on the large portion of the gas giving rise to the increased royalties that was consumed or otherwise disposed of by Phillips rather than sold to an interstate

from their producer. The gas lease controls the relationship between producer and royalty owner and "operates to divest the lessor [royalty owner] of his right to obtain title in himself by reduction to possession and that thereafter his claim must be based upon the contract with the one to whom he has granted that right." *Greenshields v. Warren Petroleum Corp.*, 248 F.2d 61, 67 (10th Cir. 1957) (applying Oklahoma law). Usually the royalty owner is entitled to receive as royalty a fraction of the gas sale proceeds from the producer. In many cases Phillips agreed with the producer to distribute the royalty portion directly to the royalty owner.

[20] The effect of these contracts was neither raised nor decided in *Shutts I*.

pipeline. Since Phillips did not sell the gas, it never received anyone's "suspense monies." No interest obligation arose because Phillips never acted as a stakeholder and never had the use of any money. Cf. *Phillips Petroleum Co. v. Adams*, 513 F.2d 355 (5th Cir. 1975) (equitable interest allowed for stakeholder's use of money). *Accord*: *First National Bank of Borger v. Phillips Petroleum Co.*, 513 F.2d 371 (5th Cir. 1975); *Phillips Petroleum Co. v. Riverview Gas Compression Co.*, 513 F.2d 374 (5th Cir. 1975).

2. *By Applying Its Own Notions Of "Equity" Kansas Subverted Policies Of Other Interested States*

The national application of the Kansas court's idea of equity ignores the fact that other interested states have chosen to treat these transactions differently. For example, Texas has recognized that any obligation to pay interest is grounded in the contractual relation between Phillips and the payee. *Phillips Petroleum Co. v. Stahl Petroleum Co., supra.* That liability never could be more than a simple debt arising under a contract.

Even if Texas would recognize an equitable basis for an award of interest, it also would recognize countervailing equities. Phillips' offer to all royalty owners to pay additional royalties if those royalty owners agreed to refund any overpayment would stop interest accruing in Texas. *Phillips Petroleum Co. v. Riverview Gas Compression Co.*, 409 F. Supp. 486 (N.D. Tex. 1976). Because the Texas leases account for nearly one-half the money involved in this case, Pet. App. A62, when Kansas ignored this established Texas principle, it increased Phillips' liability dramatically. Phillips has now been held liable for interest on approximately $5.6 million of Texas money, whereas under Texas law it would be liable for interest on approximately $2.0 million. More than doubling its liability in this situation certainly goes well beyond what respondents refer to as "harmless error."

The attempt by the respondents to generalize—indeed, virtually federalize—the basis of the holding below is totally misdirected. The relationship between a royalty owner and a producer has been left to individual state control. *E.g., Mobil Oil Corp. v. Federal Power Commission*, 463 F.2d 256 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 967 (1972). States have been free to regulate this relationship, and have formulated individual policies to address specific problems. The resulting lack of uniformity

> is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941). The decision below subverts the ability of the states to take different approaches to the situation presented in this case.

3. *Kansas Applied A Rate Of Interest Substantially Higher Than Those In Force In Other States*

Kansas awarded prejudgment interest at FPC rates that varied between 7 percent and 20.31 percent, largely above 11 percent. Pet. App. A54. These rates were used because the Kansas court deemed that Phillips' corporate obligation to pay interest on refunds at the FPC rate was an express contract providing for an interest rate higher than the Kansas statutory rate. *Herman v. City of Wichita*, 228 Kan. 63, 68, 612 P.2d 588, 593 (1980), *citing*, *Shutts I*, 222 Kan. at 563, 567 P.2d at 1318-19. Other states undoubtedly would assess only a statutory rate of interest. *Phillips Petroleum Co. v. Stahl Petroleum Co., supra.* The effect has been to expose Phillips to a liability of $6.5 million whereas interest at a statutory rate would result in an exposure of $1.9 million.[21] There

[21] The rates prevailing in some other states that are applicable to the present dispute are: Texas—6 percent, Tex. Rev. Civ. Stat. Ann. Art. 5069-1.03 (Vernon); Oklahoma—6 percent, Okla. Const. Art. 14, § 2, Okla. Stat. Ann. tit. 15 § 266; New Mexico—6 percent N.M. Stat. Ann. 56-8-3 (1978).

simply is no basis for believing that Oklahoma, Texas, or any other interested state would abandon their own rule of law in favor of the unique ideas espoused by the court below. Nor is there any constitutional justification for Kansas applying its interest rates to royalties under arrangements having absolutely nothing to do with that state—for example, to Texas gas under a contract between a Texan and Phillips, a Delaware corporation with its principal place of business in Oklahoma.

B. It Is Inappropriate For This Court To Prescribe A Choice Of Law Rule For Kansas

As an alternative to their Kansas-law-is-fair argument, respondents ask this Court to adopt a choice of law rule for Kansas that would apply Oklahoma law to all the transactions aggregated in this class action.[22] This Court should do nothing more than determine that it is constitutionally impermissible to apply Kansas law to the thousands of non-Kansas transactions involved in this lawsuit. It should not render an advisory opinion as to what choice of law rule could be upheld. "It is not this Court's function to establish and impose upon state courts a federal choice of law rule . . . ." *Allstate Ins. Co. v. Hague, supra* at 332 (Stevens, J., concurring). The constitutionality of a choice of law rule looking to Oklahoma law is not before this Court. Since the court below chose to apply Kansas law, "the only question before this Court is whether that choice was constitutional." *Allstate Ins. Co. v. Hague, supra* at 306 n.6.

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[22] Contrary to respondents' assertions, Phillips does not concede that Oklahoma law could be applicable to all the transactions because most of them do not have sufficient contacts with that state. That is precisely the same reason Phillips believes that Kansas law cannot be applied to all transactions. Moreover, Kansas's demonstrated penchant for favoring royalty owners above all else would not be served by applying Oklahoma law to Kansas residents or transactions.

IV. CONSTITUTIONAL PRINCIPLES OF FEDERALISM REQUIRE SOME RESTRICTIONS ON STATE COURT JURISDICTION AND CHOICE OF LAW

The respondents' brief gives the impression that the only policy objective is how to maximize the utilization of the class action procedure. That is a rather distorted image of the situation. There are much larger questions and values at stake that must be accorded proper weight in order to protect vital elements of our federalism.

Individual states, in deference to the needs of federalism, generally have adopted policies and procedures that respect the interests of the other states. This spirit of cooperation, however, does not assure that conflicts among the states never will arise. States that possess very ardent policies in certain substantive law areas may be more vigorous in their creation, recognition, or enforcement of rights and more willing to perceive wrongs than states that are less strident as to the same matters. A certain amount of discontinuity is inevitable. But when a particular state's zeal becomes excessive and threatens the balance among the states, the conflict becomes intolerable and this Court must act.[23]

In the past, this Court has been successful in minimizing the extent of the conflicts primarily by imposing flexible restrictions on state court jurisdiction. This has been accomplished by demanding a connection among the defendant, the forum, and the litigation, which has required a state to have a legitimate interest in resolving a dispute. The unrestricted use of nationwide class actions based solely on common questions, however, poses a

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[23] As pointed out by the Amicus, Consumer Coalition, Attorney Generals for eight states submitted an amicus brief in support of the consumers in *Gillette Co. v. Miner*. Contrary to Consumer Coalition's implication, the absence of similar amicus briefs in this case may well signify that the reach of the Kansas courts and the application of Kansas law to the entire class made it unpalatable to support respondents ("the consumers").

serious potential for interstate conflicts, especially in cases like the present one, in which the vast majority of the plaintiffs are nonresidents, their claims have no nexus with the forum, and the forum state attempts to impose its will on the nation by applying its own law. This threat can be minimized by (1) enforcing this Court's statement that "all assertions of state court jurisdiction must be evaluated according to the standard set forth in *International Shoe* and its progeny," and consistently applying the jurisdictional standards enunciated in *World-Wide Volkswagen Corp. v. Woodson, supra, Rush v. Savchuk, supra,* and *Shaffer v. Heitner, supra,* and (2) strictly applying the principle stated in *Allstate Ins. Co. v. Hague, supra,* requiring some state interest exist to justify applying that state's law. Maintaining these standards certainly would diminish the ability to forum shop, as well as the danger that a state, in its ardor to enforce a particular policy, intentionally or unintentionally, will defeat the policy of other states. Cases will be decided less as a result of which forum state is chosen and more in conformity with the policies of those states with legitimate interests in the litigation.

Federalism demands that state judicial power be restrained whenever it intrudes into disputes that properly are left to other states. The exercise of jurisdiction by Kansas in the present case and its parochial application of forum law was an arbitrary extension of its class action procedure to people and transactions that Kansas had absolutely no legitimate interest in affecting and that operated discriminatorily against Phillips and all of the nonresident members of the class. See Brilmayer, *How Contacts Count: Due Process Limitations On State Court Jurisdiction,* 1980 Sup. Ct. Rev. 77, 86. It demonstrates the need for this Court to apply the existing jurisdiction and choice of law standards to protect the legitimate interests of federalism.

CONCLUSION

For the foregoing reasons, the decision of the Court below should be reversed.

Respectfully submitted,

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